



## **Appendix D1**

# **Literature Review of Research into Rape and Sexual Assault**

*A report commissioned by Research, Development  
and Statistics Directorate of the Home Office for the  
Review of Sexual Offences*

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## Summary

This paper examines the offences of rape, procuring intercourse by threat or false pretences, indecent assault on a woman or on a girl under 16, incest, unlawful sexual intercourse with under-age girls, burglary with intent to rape and indecent exposure. It considers the substantive law relating to each offence and sets out the main issues for consideration by the Sex Offences Review Teams. It also suggests a variety of strategies for dealing with these issues. Reference is made to research studies and to the policy considerations which bear on legal change in this area. Comparisons are drawn with the approach taken in other common law jurisdictions and possible ECHR implications are noted.

### 1. Rape

The present definition of rape is sexual intercourse with a person without consent, which takes places knowingly or recklessly. Issues arising with respect to the meaning of sexual intercourse are whether the definition of sexual intercourse should be extended to cover any other serious intrusions, whether rape should continue to be an offence that can only be perpetrated by males and whether it should cover the penetration of an artificially constructed vagina?

With regard to the consent element in rape the issues are whether this matter should be left to the jury to determine on a case by case basis in accordance with the decision in *Olugboja* or whether the law should attempt to define consent, for example, as free agreement and set out a non-exhaustive or exhaustive list of the circumstances in which consent will be deemed to be present or absent. A further question relates to the line which should be drawn between threats and frauds covered by the law of rape and those covered by sections 2 and 3 of the Sexual Offences Act 1956. The concept of abuse of power and authority where vulnerable adults are concerned is discussed and whether the criminal law should intervene in such cases possibly by the introduction of new offences. The lack of clarity in the present law regarding the consent of children and the mentally impaired is highlighted.

As far as the mental element is concerned the chief issues are whether the formula currently in use as a way of explaining recklessness viz. “could not care less” is appropriate and whether the law as set out in *Morgan* should be retained.

### 2. Procuring sexual intercourse by threat or false pretences

These offences were found to be scarcely ever used in practice. The issues are whether they should be retained and if so in what form. Should there be limits set to the type of qualifying threats, should the term false pretences be retained and to what sexual acts should the offences apply. The need for gender neutrality is a particular concern. There is also the issue of penalties.

### 3. Indecent assault on a woman

This offence covers sexual activity involving minors as well as sexual assaults against adults. The paper suggests that the review consider whether these two strands should be placed into separate offences. Given the very wide scope of assaultive behaviours covered, from, for example, sexual touching to object penetration, a further issue is whether there should be degrees of the offence. The appropriateness of the existing nomenclature is a further matter. There is at present no defence to a charge where the defendant is mistaken as to age and there is thus the question of whether such a defence should be introduced. At present equivocal acts accompanied by a sexual motivation are classified as indecent assaults. This controversial aspect of the law requires consideration.

#### **4. Incest**

Many writers have urged the abolition of this offence. The issue is whether it should be retained and if so for what purpose and on what basis. A resolution of this issue would help determine further issues such as whether, if the offence is retained, it should be confined to acts of sexual intercourse, to which relationships it should apply, whether it should become gender neutral and who should be capable of being prosecuted for it.

#### **5. Sexual intercourse with young girls**

In setting up the Review the Government specified that the age of consent was to remain at 16. The chief issues are therefore those of penalty-at present the maximum penalty for an offence perpetrated against a girl of 13 or above is two years- whether there should be a separate offence dealing with those who have intercourse with girls under 13 and whether the so called “young man’s defence” should be abolished and replaced. The exploitation of children and young girls by adults as well as by other children are factors to be taken into account.

#### **6. Burglary**

Under section 9 (1)(a) of the Theft Act 1968 a person who enters a building as a trespasser with intent to rape commits the offence of burglary. The issue for the review is whether the offence should be retained.

#### **7. Indecent exposure**

This conduct is covered by the common law as well as by several statutory offences. Research studies shed light on the different types of offending and offenders who come within the umbrella of these offences and the impact on victims. The issue for the review is whether the law should be reorganised in the ways suggested previously by a Home Office Working Party which reported in 1974 and by the Law Commission in the same year or whether a quite different approach should be taken.

#### **8. Restructuring sexual offences**

Some jurisdictions such as Canada and New South Wales as well as many American states entirely restructured their law on sexual offences in the 1970s and 1980s to create ladders of offences. The purpose of this restructuring is discussed together with some of the advantages and disadvantages.



## 1. RAPE

Historically, the crime of rape was concerned particularly with theft of virginity, reflecting a preoccupation with the protection of virgins from rape, abduction and forced marriage.<sup>1</sup> It was not until 1275 that the first Statute of Westminster appears to have provided that the ravishment of any woman was an offence punishable with a penalty of two years' imprisonment and ransom. Later, in 1285, it became a capital offence under the second statute of Westminster. Although the crime has developed significantly from its early origins, the question remains whether it has changed sufficiently to meet the demands of the 21st century.

### Statistical Background: Reports, Prosecutions and Convictions

There has been a dramatic increase in the number of offences of rape recorded over the past decade. In 1987, there were 2,471 recorded offences of rape of a female as against 6,281 cases in 1997.<sup>2</sup> But the proportion of prosecutions has dropped sharply. In 1987, 1048 prosecutions were brought, 42% of the number of recorded offences<sup>3</sup> whereas in 1997, 1868 prosecutions were brought, 30% of the number of recorded offences.<sup>4</sup> The number of convictions has similarly not kept pace with the number of recorded offences. In 1987, there were 425 convictions, 17% of the number have recorded offences in that year.<sup>5</sup> But in 1997, there were 574 convictions at the Crown Court, 9% of recorded offences.<sup>6</sup> This drop in the conviction rate gives cause for concern and has been the subject of an incisive investigation by the Home Office.<sup>7</sup>

### Penalties and Sentencing

The maximum penalty for rape is life imprisonment. The average sentence length for the 483 males sentenced by the Crown Court to unsuspended imprisonment for rape of a female in 1997 was 77 months.<sup>8</sup> Aside from murder which has a fixed penalty of life imprisonment, the only offence which attracted a much higher average sentence was attempted murder, whilst the unlawful importation or exportation of a controlled drug attracted a comparable average sentence of 73 months.<sup>9</sup> In 1997, 30 men were sentenced to unsuspended imprisonment for the rape of a male. The average sentence length was 59 months.<sup>10</sup> Given the far greater number of males sentenced for female as against male rape, the difference in the average sentence length for each is not necessarily significant. These figures suggest that judges can no longer be accused of absurdly lenient sentencing in rape cases.

<sup>1</sup> See particularly Post, "Sir Thomas West and the Statute of Rapes, 1382" (1980) 53 *Bulletin of the Institute of Historical Research* 24.

<sup>2</sup> Home Office, *Criminal Statistics England and Wales 1997* Cm 4162, Table 2.16.

<sup>3</sup> Home Office Criminal Statistics England and Wales Supplementary Tables 1987 Vol 1(1988) Table S1.1(A).

<sup>4</sup> Home Office, *Criminal Statistics England and Wales Supplementary Tables 1997* Vol.1 and Vol.2 (1998) Table S1.1(A).

<sup>5</sup> Home Office Criminal Statistics England and Wales Supplementary Tables 1987 Vol. 1(1988) Table S1.1 (A) and Vol.2 (1988) Table S2.1 (A).

<sup>6</sup> Home Office Supplementary Tables 1997, *op.cit.* Table S2.1 (A).

<sup>7</sup> J. Harris and S. Grace *A Question of Evidence? Investigating and Prosecuting Rape in the 1990s* Home Office Research Study 196 (1999).

<sup>8</sup> Home Office, *Supplementary Tables 1997 op.cit.* Table S2.4.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

## Elements of the Offence

The present offence of rape is made up of several elements each of which requires separate discussion. The actus reus of the offence requires that sexual intercourse take place without consent. The defendant (D) must have acted intentionally or recklessly in order to fulfil the mens rea element of the offence.

## The meaning of sexual intercourse

Until 1994,<sup>11</sup> sexual intercourse for the purposes of rape was defined as penetration of the vagina by the penis thus reflecting the early origins of the offence. Concern about the phenomenon of male rape, which the law characterised as buggery, led to an unheralded expansion of the definition to include penile penetration of the anus of a male or a female. In thus departing from its early origins, the question that arises is whether rape should be confined in its scope to sexual assaults of this kind. Should it also include other acts of penetration such as the insertion of the penis into the mouth, as is the case, for example, in Victoria, Australia?<sup>12</sup> At present assaults involving such conduct are defined in English law as indecent assaults and are subject to the lesser maximum penalty of ten years' imprisonment. It might be thought that conduct of this kind is as seriously intrusive as anal and vaginal penetration and no less distressing.

## Penetration by objects and other parts of the body

Penetration by objects and parts of the body other than the penis are also grave assaults which might, with justification, be covered by the law of rape.<sup>13</sup> If they were, it would be hard to confine the offence to male perpetrators. To do so would mean that such assaults, when performed by a woman, would amount to an indecent assault punishable with a maximum of ten years' imprisonment but, when perpetrated by a male, would amount to rape punishable with a maximum of life imprisonment. It is possible that this could be challenged under Articles 8 and 14 of the European Convention on Human Rights (ECHR).<sup>14</sup> The inclusion of penetration by objects and other parts of the body would seem, therefore, to require that rape become a gender-neutral offence as it is in Victoria.<sup>15</sup> As sexual abuse is mainly perpetrated by men, some will prefer that an offence of rape reflect this and that rape continue to be an offence that can in law be perpetrated only by a male albeit that women can be liable as accessories. If so acts of non-penile penetration must continue to be covered by the crime of indecent assault, the penalty for which could be raised.

<sup>11</sup> Criminal Justice and Public Order Act 1994,s.142.

<sup>12</sup> Crimes Act 1958, s.2A (1), introduced by the Crimes (Sexual Offences) Act 1980,s.4.

<sup>13</sup> The definition of sexual intercourse for the purposes of the Swedish law of rape is about to be widened to include other sexual acts including penetration by parts of the body other than the penis: Swedish Government Factsheet, Violence Against Women, April 21st 1999.

<sup>14</sup> Article 8 protects the right to private life which includes sexual activities. Article 14 prohibits discrimination. It could be argued that the law would be discriminating in the way that it dealt with identical sexual assaults depending on whether they were perpetrated by a male or female so that there would be discrimination in the way that private life was protected.

<sup>15</sup> See note 12, *supra*.



## Transsexuals

A further issue is whether the penetration of an artificially constructed vagina should also amount to rape. Such an act would, at the very least, amount to an indecent assault since, whatever view is taken of the effect of a sex change operation, the new organ must surely be recognised as a sexual one. Now that rape encompasses acts of buggery, it can no longer be argued, as it was by the Criminal Law Revision Committee (CLRC)<sup>16</sup>, that a distinguishing feature of rape is that it puts a woman at risk of pregnancy. Rape is now concerned purely with sexual violation. As such the authenticity of the vagina does not appear to be of much significance. Recognition that the law of rape covers penetration of an artificial vagina would not conflict with case law in other areas which has resolutely refused to recognise that a male to female transsexual who undergoes a sex change operation ceases to be male.<sup>17</sup> The Criminal Justice and Public Order Act (CJPOA) s.142 states that a man commits rape if he has sexual intercourse with a *person* whether vaginal or anal. Thus whether or not a transsexual is a woman or a man is of no consequence. All that is required is that a vagina is penetrated. The only issue therefore is whether or not the word vagina should be taken to include one that is artificially constructed. In rare cases, women with congenital abnormalities may also require the surgical construction of a vagina. The matter was not discussed during the parliamentary debate on the Act nor has the Court of Appeal yet considered the issue.<sup>18</sup> One problem is that the artefact created by the surgeon in a sex change operation, described in *Tan*<sup>19</sup> as “an artificial vaginal pocket”, is not anatomically a vagina at all. The question is whether this matters. An artificial vagina may be penetrated. On the other hand not all acts of penetration are covered by the crime of rape. So long as the crime of indecent assault continues to cover certain acts of penetration there can be no argument that transsexuals have been discriminated against if penetration of a constructed vagina is classified as an indecent assault. They would, however, continue to be treated in the same way as males for whom the only form of penetration covered by the offence of rape is penetration of the anus. On the other hand the more that rape expands to cover a variety of acts of penetration, the stronger the argument becomes for including penetration of an artificial vagina within rape if the law is not to be seen as discriminatory. In Victoria the legislation specifically states that vagina includes a surgically constructed vagina for the purposes of the law of rape.<sup>20</sup>

On the assumption that the crime of rape is retained in its present form and that penetration continues to remain as the core of the offence, the first issues that arise are:

**Should the definition of sexual intercourse be extended to cover any other serious intrusions or has the line between indecent assault and rape been correctly drawn?**

**Should rape continue to be an offence that can only be perpetrated by males? Should rape cover the penetration of an artificially constructed vagina?**

<sup>16</sup> Working Paper on Sexual Offences (1980), para.45.

<sup>17</sup> See *Corbett v Corbett* [1970] 2 All ER 33; *R v Tan* [1983] 2 All ER 12.

<sup>18</sup> It was the opinion of Hooper J. in the unreported case of *Mathews* tried at Reading Crown Court in October 1996 that an artificially constructed vagina was included within s.142. See M.Hicks and G. Branston, “Transsexual Rape-A Loophole Closed?” [1997] Crim.L.R.565 at 565.

<sup>19</sup> *Loc.cit.* at p.19.

<sup>20</sup> Crimes (Sexual Offences) Act 1991, s.3 amending s.39 of the Crimes Act 1958.

## Without consent

It was not until 1976 that rape was defined by the Sexual Offences (Amendment) Act 1976 as sexual intercourse without the consent of the victim. In fact the common law had moved to this position in the nineteenth century when it recognised that rape was not necessarily an offence requiring violence or the threat of violence by the defendant and struggle and resistance by the victim. It could be perpetrated where sexual intercourse took place with a woman who was asleep<sup>21</sup> or so overcome by drink that she was insensible.<sup>22</sup> But the 1976 Act made no attempt to define what was meant by the phrase “without her consent”. This absence of definition of the key element in this offence has meant its parameters are unclear. Nor can any assistance be sought from other sexual offences in which consent is the key element since nowhere is the phrase defined by statute and the courts have also fought shy of providing a definition. However, before 1976, it was well established that in the following situations consent would be regarded as absent:

1. where D has used force to procure intercourse;
2. where D has threatened the complainant(V) with force to procure intercourse;
3. where V fears force;
4. where D has perpetrated a fraud on V as to the nature of the act he is intending to carry out e.g. V is deceived into believing that she is to undergo an operation;<sup>23</sup>
5. where D impersonates V’s husband;<sup>24</sup>
6. where D has sexual intercourse with V who is asleep;
7. where D has sexual intercourse with V who is so overcome with drink that she is insensible.

But even in these situations there was and is a lack of clarity as to the precise scope of the law. For example, will the threat of force to someone other than V suffice and what if the threat or fear of force applies to some time in the future?

The Concise Oxford English dictionary gives “voluntary agreement” as its first meaning of consent. There are many situations other than those set out above in which it might be thought that consent is absent. Sexual intercourse may, for example, have been secured by kidnapping or false imprisonment that did not involve force or by trickery of all kinds. V might have been subjected to threats of eviction or of dismissal from a job. Similarly, compliance may be secured by fears other than of force. It is not clear whether in any of these situations V’s consent will be regarded as absent. The only response that the law has offered to deal with the issue of consent in situations not covered by Categories 1-7 is the decision in *Olugboja*<sup>25</sup> in which it was held that it was up to the jury to decide in each individual case whether or not V had consented to sexual intercourse. Consent was a question of V’s state of mind at the time. The judge would need to instruct the jury that there is a difference between consent and submission. A person who submitted to sexual intercourse may or may not have consented to it. It was up to the jury to decide whether, if V submitted, that submission should be regarded as consent. The jury would decide this “applying their combined good sense, experience and knowledge of human nature and modern behaviour to all the relevant facts of the case”.<sup>26</sup>

<sup>21</sup> *Mayers* (1872) 12 Cox C.C.311.

<sup>22</sup> *Camplin* (1845) 1 Cox C.C.311.

<sup>23</sup> *Flattery* (1877)2 Q.B.D. 410.

<sup>24</sup> CJPOAct 1994,s.142 (3), re-enacting Sexual Offences Act 1956,s.1 (2). This has recently been expanded to cover the impersonation of any other person so that V believes that she is having sexual intercourse with somebody other than D himself. *Elbekkay*[1995] Crim LR 163.

<sup>25</sup> [1981] 3 All.ER. 1382.

<sup>26</sup> At p. 449.



The decision in *Olugboja* is radical in that it appears to seek to overturn the old approach of the common law altogether. It appears to suggest that in every case of rape, consent will be an issue for the jury to decide on the facts. Fixed categories of cases in which the law recognises that consent is absent should no longer apply. Thus even where force is used or threatened the issue of consent would remain one for the jury to decide.

Academic commentators have responded in different ways to this decision. Smith and Hogan have stated that the distinction between consent and submission is “so vague that both judges and juries may have quite different ideas as to its application”.<sup>27</sup> Certainly, in *McAllister*<sup>28</sup>, the jury demonstrated its confusion over the matter by specifically requesting the judge to clarify the distinction between consent and submission. Simon Gardiner,<sup>29</sup> on the other hand, has hailed the decision as a considerable breakthrough in advancing the legal protection of sexual autonomy. In depicting consent as the state of mind of the individual complainant, he argues, it permits the jury to decide in each case whether consent was present. “Solicitude for the individual”<sup>30</sup> is thus the hallmark of the decision. In his view, after *Olugboja* there are no longer any certainties or fixed standards. Sexual autonomy “can only be about individual choice”.<sup>31</sup>

It is hard to agree with this point of view. Rather it seems that *Olugboja* does little to increase the protection of sexual autonomy. The decision, in transforming issues of law into issues of fact for the jury, makes for uncertainty. There is no reason to welcome this. There is no way of telling in advance of a court hearing whether in law consent is present or not. In this way the law fails to meet a minimum requirement of clarity, certainty and comprehensibility. Moreover, by failing to spell out or provide any criteria by which lack of consent can be judged, much oppressive behaviour is likely to go unpunished. Neither prosecutors nor juries can be expected to wander far from common understandings of rape as forcible violation.

The decision in *Olugboja* has been ratified by further decisions of the Court of Appeal (see e.g. *Malone*<sup>32</sup>). In *Larter and Castleton*<sup>33</sup>, a 14 year old girl was raped whilst she was asleep. If the old common law had been applied she would as a matter of law have been held not to have consented if the jury was satisfied that she was asleep at the time. The Court of Appeal, however, upheld *Olugboja* and stated that consent was an issue for the jury. This suggests that the law is indeed shifting away from a “categories” approach. On the other hand, in *Linekar*,<sup>34</sup> a case involving sexual intercourse by fraud, the Court of Appeal effectively held that the law recognised only two types of fraud that would negative consent and that the categories of rape by fraud were closed.

Thus the law at present on the issue of consent in rape is afflicted by a threefold uncertainty. First, there is the uncertainty generated by the absence of any statutory provision defining consent. Secondly, there is the decision in *Olugboja* itself that seeks to abandon a legal standard of non-consent in favour of jury decisions on individual cases. Finally, there is the uncertainty as to the extent to which *Olugboja* has indeed displaced the old common law.

<sup>27</sup> *Criminal Law* 9th edition (1999) p.459.

<sup>28</sup> [1997] Crim.L.R. 233.

<sup>29</sup> “Appreciating *Olugboja*” 16(3) *Legal Studies* 275.

<sup>30</sup> At p.287.

<sup>31</sup> At p.292.

<sup>32</sup> [1998] Crim.L.R. 834.

<sup>33</sup> [1995] Crim.L.R. 75.

<sup>34</sup> [1995] 3 All ER 69.

The decision in *Olugboja* raises a fundamental question for the review:

**Should the issue of whether or not V consented to sexual intercourse be left as a matter for the jury to decide in each case on an individual basis or should the law attempt to set out the circumstances in which consent will be deemed to be present or absent.**

On the assumption that the current basic structure of the crime of rape is retained at least four options for tackling the problem of consent may be considered:

### **Option 1: Olugboja**

*Olugboja* could be endorsed. There would need to be clarification as to the extent to which the old common law categories still apply. The CLRC, however, was critical of the decision stating “It is in our opinion inherently unsatisfactory to leave what constitutes an offence to be determined on the facts of each case”<sup>35</sup>. In terms of the principles set out for the Review this option conflicts with the requirement that the law be certain so that there is no doubt about the nature of the offence.

### **Option 2: A Statutory Definition of Consent**

This involves creating a statutory provision which incorporates a definition of consent into the law. For example, Canadian law provides: “Consent means the voluntary agreement of the complainant to engage in the sexual activity in question”<sup>36</sup>. In Australia, the law of the Northern Territory and Victoria each provide that consent is “free agreement”<sup>37</sup> and in Tasmania, consent means “consent which is freely given by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which the consent is given.”<sup>38</sup> But these definitions beg the question of when an agreement to have sexual intercourse is to be regarded as voluntary or free. (For example, does a wife agree to sexual intercourse voluntarily if she submits unwillingly in order to avoid a row?) To answer this question, the legislation sets out a list of circumstances in which consent will be deemed to be absent. Whilst some lists are more comprehensive than others, since all are non-exhaustive, the question of what constitutes a voluntary or free agreement still, to a lesser or greater extent, remains. The Australian Capital Territories has legislation that contains a lengthy non-exhaustive list of situations where consent will be regarded as absent but there is no accompanying definition of consent.<sup>39</sup>

### **Option 3: A comprehensive list of situations where consent will be deemed to be absent**

This option would involve the creation of a statutory provision that sets out all the circumstances in which consent will be deemed to be absent. But whilst this might promote certainty it could be argued that it would deprive the law of flexibility in that behaviour which does not fall within any of the categories could not be regarded as rape.

<sup>35</sup> Fifteenth Report, *Sexual Offences* (1984) para. 2.25.

<sup>36</sup> Canadian Criminal Code, s.153 (2).

<sup>37</sup> Northern Territory of Australia, Criminal Code s.192; Victoria, The Crimes(Rape) Act 1991, s.36.

<sup>38</sup> Tasmania, Criminal Code 1924, Schedule 1, Chap.1, s.2A.

<sup>39</sup> Crimes Act 1900, s.92P.



#### **Option 4 : The Criminal Law Revision Committee's approach**

The CLRC did not consider adopting a definition of consent and was unanimously in agreement that "it would be impracticable to define what is meant by absence of consent"<sup>40</sup>. Instead, it proposed that statute should simply set out which threats<sup>41</sup> and which types of fraud<sup>42</sup> should negative consent and should otherwise remain silent on the matter. Uncertainty as to the full scope of the offence of rape would thus remain. The Law Commission has mainly sought to follow this approach<sup>43</sup> which has been adopted, broadly speaking, in New South Wales<sup>44</sup>.

If Option 1 is rejected, it will be necessary to determine, at least in some measure, the circumstances in which the law should deem consent to be absent. This is a matter of policy. It involves balancing a series of different considerations. A modern law of rape should seek to protect sexual autonomy and sexual choice but it cannot seek to curb all incursions into autonomy. Some may be left to lesser offences, some to be dealt with by the civil law or by regulatory bodies and some must be left for the individual to deal with as part of the business of living in the world. Also material to the scope of consent is the issue of punishment. It is assumed for the purposes of this discussion that life imprisonment will be retained as the maximum penalty for rape.

#### **Consent obtained by force**

Rape has traditionally been understood in terms of the use of force. The Law Commission has provisionally proposed that force should include detention or abduction<sup>45</sup>. The Victorian law<sup>303</sup>, the law of the Northern Territory<sup>47</sup>, and the law of the Australian Capital Territory<sup>48</sup> specifically state that consent is vitiated where the person submits because she or he is unlawfully detained.

#### **Consent obtained by threat**

The CLRC proposed that only express or implied threats of immediate force against V or another person should suffice for rape. Threats which, on a reasonable view, could not be carried out immediately should not qualify even if V thought that they could be carried out immediately. All other threats should be dealt with under section 2 of the Sexual Offences Act 1956, discussed below, which makes it an offence to procure a woman to have sexual intercourse by threats or intimidation. It proposed that the penalty under this section should be raised from two to five years' imprisonment<sup>49</sup>.

It is clearly appropriate that threats to third parties should be included as they are in many jurisdictions<sup>50</sup>. In other respects, however, this proposal is open to criticism. The requirement that

<sup>40</sup> CLRC Report, *op.cit.* para. 2.18.

<sup>41</sup> *Ibid.* para. 2.29.

<sup>42</sup> *Ibid.* para. 2.25.

<sup>43</sup> Law Commission, Consultation Paper No 139, *Consent in the Criminal Law* (1995) pp .202 and 205.

<sup>44</sup> New South Wales Crimes Act 1900, s.61R (2).

<sup>45</sup> Law Commission Consultation Paper No.134, *op.cit.* para.6.36.

<sup>46</sup> The Crimes (Rape) Act 1991, s.36.

<sup>47</sup> Criminal Code Act, s.192.

<sup>48</sup> Crimes Act 1900, s.92P.

<sup>49</sup> CLRC Report, *op.cit.* para. 2.102.

<sup>50</sup> E.g. Northern Territory of Australia, Criminal Code Act s.192, Victoria, *Crimes Rape Act 1991*, s.36 and New Zealand Crimes Act 1961, s.128A (2).

the threat must *on a reasonable view* be capable of being carried out immediately ignores the reactions of the victim herself and her state of fear and knowledge at the time. People who are afraid may not be capable of taking a reasonable view. Moreover, a requirement that the threat be one of *immediate* force would discount the legitimate fear of the complainant that she will be subjected to serious violence in the future. The common law did not necessarily require the threat of force to be immediate and it would seem strange for the modern law to be more restrictive in this respect. Is a young woman who is threatened that she will be gang raped the following week or month or at some point in the future if she does not submit, to be held to have consented when she fears that this is likely to happen? Where a person commits a crime under duress, the immediacy requirement has been held in several cases not to prevail<sup>51</sup>. It would be remarkable indeed if a victim was to be denied the protection of the law on the ground that the threat was not an immediate one. Moreover, an immediacy requirement would lead inevitably to lengthy cross-examination and argument over whether or not the threat was immediate, believed to be immediate, or could have been resisted or avoided so that it was not immediate. This would be a retrograde step. A law which fails to protect against all threats of violence cannot lay claim to the protection of autonomy.

The Law Commission proposes that the test should depend on V's own belief as to the immediacy of the threat and whether V believes the threat will be carried out before she can free herself from it<sup>52</sup>. Whilst this is clearly an improvement on the CLRC recommendation, it remains unrealistic to expect victims in a moment of fear to address their minds to such calculations. It is noteworthy that in many other jurisdictions no such limitations have been thought to be necessary<sup>53</sup>.

It might also be thought that there are other serious threats that the law of rape should cover. A threat of force should be taken, according to the Law Commission, to include a threat of detention or abduction<sup>54</sup>. But what of threats to commit another criminal offence against the victim, threats to accuse anyone of a criminal offence or to expose a secret which would be highly damaging to V's interests. The Australian Capital Territory includes a threat to publicly humiliate or disgrace, to use extortion against or to physically or mentally harass.<sup>55</sup> Tasmania includes "threats of any type"<sup>56</sup> and the Northern Territory and Victoria similarly include fear of harm of any type<sup>57</sup>. The Californian Penal Code includes threats to use the authority of a public official to incarcerate, arrest or deport the victim or another where the victim has a reasonable belief that the perpetrator is a public official<sup>58</sup>. The present penalty for rape might be thought to argue for confining its scope to the most serious threats and assigning lesser threats to section 2 with an amended penalty. However, the virtual desuetude of section 2 must raise concerns as to whether threats consigned to it would ever be pursued within the criminal justice system.

The issue for the Review is thus:

**How should the line be drawn between threats covered by the law of rape and those covered by Section 2 of the Sexual Offences Act 1956?**

<sup>51</sup> See e.g. *Hudson* 1971] 2 All ER 244.

<sup>52</sup> Law Commission Consultation Paper No 139, *op.cit.* para.27, p.205.

<sup>53</sup> In New Zealand, the Australian Northern Territory, Tasmania, Victoria, Australian Capital Territory and Queensland there is no such restriction.

<sup>54</sup> Law Commission Consultation Paper No.139, *op.cit.* para. 6.34.

<sup>55</sup> Crimes Act 1900, s.92P.

<sup>56</sup> Criminal Code Act 1924, Schedule 1, Part 1, chap.1, s.2A(2).

<sup>57</sup> Criminal Code s.92; Crimes (Rape ) Act 1991, s.36.

<sup>58</sup> S.261.



### Consent obtained by fear

The Policy Advisory Committee (PAC) which was set up to assist the CLRC in its deliberations proposed that there should be a specific statutory provision to make it clear that a woman is raped if she submits to sexual intercourse through fear<sup>59</sup>. The CLRC did not see the need for this although it was in no doubt that submission obtained through fear of force would not amount to consent<sup>60</sup>. A statutory provision would be consistent with the principle in the Review that the law should be clear and certain. The question arises whether fear other than of force should be included. In Victoria and the Northern Territory fear of harm of any type will vitiate consent<sup>61</sup>. However the Australian Model Criminal Code Officers Committee does not favour this approach because of its breadth. It was not convinced that fear of say, substantial economic harm or job loss should be dealt with by the criminal law at all<sup>62</sup>. Certainly, it seems legitimate for the law to distinguish between situations where specific threats are uttered and those where there are none but V fears action will be taken.

### Consent obtained by fraud

In the Australian Capital Territory<sup>63</sup>, a fraudulent representation of any fact made by D or by a third party to D's knowledge will vitiate consent. The CLRC took a very different approach recommending that the only frauds which should be sufficient to negative consent for the purpose of the law of rape should be those recognised by the common law as having this effect *viz.* frauds as to the nature of the act and frauds as to identity. It proposed that there should be a statutory provision to this effect<sup>64</sup>. One view is that there is a sound reason for drawing the line at this point.<sup>65</sup> In such cases there is no agreement to intercourse with D – V, through his deception, either does not realise that it is a sexual act that he has in mind or else does not realise who D is. Thus the fraud goes to the very root of the transaction. V has been deprived of the choice of whether or with whom to have sexual intercourse. The same cannot be said of other frauds. For example, where D promises to marry V if she has intercourse with him when he has no intention of doing so, she is at least agreeing to sexual relations and with D albeit that she has been deceived. Such frauds should, in the CLRC's view, be dealt with under Section 3 of the Sexual Offences Act 1956, discussed below, which makes it an offence to procure sexual intercourse by false pretences. The Court of Appeal in *Linekar*<sup>66</sup> accepted this approach.

A further issue that arises is whether, in the absence of fraud, a *mistake* by V as to the nature of the act or as to identity should be regarded as vitiating consent. It would be hard to argue that consent is present in this situation since V's state of mind is the same whether a fraud is perpetrated or not. In New Zealand, the Northern Territories, Victoria and New South Wales consent is regarded as vitiated in these circumstances.<sup>67</sup> Liability for rape would ensue only where D realised

<sup>59</sup> CLRC Report, *op.cit* para. 2.27.

<sup>60</sup> *Ibid*, para.2.28.

<sup>61</sup> Victoria Crimes (Rape) Act 1991, s.36; Northern Territories Criminal Code s.192.

<sup>62</sup> Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, Discussion Paper Model Criminal Code (1996) p.57.

<sup>63</sup> Crimes Act 1900, s.92P.

<sup>64</sup> CLRC Report, *op.cit.* para. 2.25.

<sup>65</sup> J.Temkin, "Towards A Modern Law of Rape" (1982) M.L.R. pp. 401-406. This was also the view of the Model Criminal Code Officers, see note 62.

<sup>66</sup> [1995] 3 All ER 70.

<sup>67</sup> Crimes Act 1961 s.128A; Criminal Code, s.192; Crimes (Rape) Act 1991, s.36; New South Wales Crimes Act 1900, s.61D (3).

that such a mistake has or may have been made. In this situation D is deliberately taking advantage of what he knows to be V's mistake or alternatively has decided not to disabuse her where he realises she may be mistaken. The Law Commission favours liability in these circumstances.<sup>68</sup>

In Victoria and the Northern Territories consent is vitiated where V mistakenly believes that the act is for medical or hygienic purposes<sup>69</sup>. This would, for example, cover cases where a person masquerades as a doctor or nurse and pretends to carry out a medical examination or where a doctor carries out such an examination for non-medical reasons. V has not consented to sexual interference but to a medical procedure. If sexual intercourse is defined for the purposes of rape to include digital or object penetration, then it is appropriate that a mistake of this nature should vitiate consent. Such a provision would ensure that there is no unnecessary debate as to whether V was mistaken as to the nature of the act in such circumstances<sup>70</sup>.

The Law Commission was not entirely convinced by the CLRC approach and was prepared to consider that other serious frauds should be regarded as capable of vitiating consent. It invited consideration of a specific proposal that the existing categories of fraudulent rape be expanded to cover fraud as to HIV status and that a comparable offence be created to cover females who perpetrate a similar fraud.<sup>71</sup> This proposal might be thought to have certain attractions. A person who expressly lies about HIV status deliberately places the life of the deceived party at risk. Neither fraud by impersonation nor fraud as to the nature of the act can compare in terms of the potential seriousness of the outcome. On the other hand, a deception as to HIV status is very different from those two frauds. The victim of a fraud as to HIV status, in common with the victim of a fraud as to marital intentions, would have been content to have had sexual intercourse with D were it not for a particular circumstance. Arguably therefore frauds as to HIV status should be dealt with, if at all,<sup>72</sup> under Section 3.

The issues for consideration are:

**Which frauds should be regarded as vitiating consent for the purposes of the law of rape and which should be dealt with under Section 3 of the Sexual Offences Act 1956? Should equivalent mistakes be regarded as vitiating consent?**

**Consent obtained by abuse of power, authority or position of trust**

This can occur in a variety of different ways:

### **1. Where there is no practical means of escape**

V may submit to sexual intercourse where no threats are uttered and where there may be no fear of violence but through fear of the consequences of refusal since D is in a position of power or authority and there is no practical means of escape. Men and women compelled to live in institutional settings from which they are unable to discharge themselves such as prisons and elderly people in residential care might find themselves in this situation. Prison officers and residential care workers are in a position of power that may border on the absolute. In this situation consent may be said to be absent. There is no voluntary agreement to sexual intercourse. On the contrary V is utterly unwilling to have intercourse and submits purely out of fear.

<sup>68</sup> Law Commission Consultation Paper No.139, *op.cit.* para. 6.26.

<sup>69</sup> Crimes (Rape ) Act 1991, s.36; Criminal Codes 192.

<sup>70</sup> See G. Williams, *Textbook of Criminal Law* (1983) p.564-5.

<sup>71</sup> Law Commission Consultation Paper No. 139, *op.cit.* paras. 6.19 and 6.80.

<sup>72</sup> Organisations such as the Terrence Higgins Trust do not consider that use of the criminal law is helpful in these circumstances. It is thought that this would run counter to the idea that individuals should take responsibility for their own sexual health and could act as a deterrent to regular testing.



## 2. Where V still has choices

An employer, without using threats, may abuse his position of power to have sexual intercourse with an employee. She again is entirely unwilling but submits out of fear that she might lose her job or be treated otherwise unfavourably. It is less obvious that consent ought to be regarded as absent here since the employee does have choices left open to her.

## 3. Abuse of a professional relationship

One instance of this is where doctors, psychiatrists, therapists and counsellors take advantage of those who have come to them for help at a time when they are emotionally or mentally vulnerable. Schulhofer explains that a patient in therapy “must learn to lower her psychological defences, to discuss her innermost thoughts and fears and to place an extraordinary degree of trust in her therapist. The psychological dynamics of therapy are powerful...When doctor-patient relationships evolve from the professional to the sexual serious harm to the patient usually results.”<sup>73</sup>

A patient may not wish to have sexual relations with her therapist but may fear that he will otherwise terminate the therapy, a result which she is too dependant or emotionally disturbed to contemplate. Alternatively she may welcome the therapist’s advances or be too confused to resist them. Therapy “distorts the patient’s awareness of the dangers of a sexual encounter”.<sup>74</sup> Breaches of trust of this nature can have tragic consequences—patient suicide is mentioned frequently in the literature<sup>75</sup>. Schulhofer argues that patients cannot make an adequately informed decision and are best treated as incapable of giving a valid consent<sup>76</sup>.

It might be thought that situations of this kind are best dealt with through the disciplinary codes of the professional bodies concerned. However many of those who describe themselves as therapists do not belong to a professional body. Further regulation is one response but it is not clear that even those who do belong to a professional body can be sanctioned sufficiently.<sup>77</sup> An alternative approach is the use of civil actions but the law of tort has not been especially responsive where the damage is emotional. The question is whether it is appropriate for the criminal law to intervene in this situation.

There are different ways of approaching the problem of abuse of authority. The Canadian law states that consent is vitiated “where D induces V to engage in the activity by abusing a position of trust, power or authority.”<sup>78</sup> The Australian Capital Territory has a similar provision<sup>79</sup> and Tasmania provides that consent is not freely given where it is procured by reason of the person being overborne by the nature or position of another person.<sup>80</sup> The breadth of these provisions is likely to lead to difficulties of interpretation.

By contrast, the Sexual Offences Amendment Bill 1998 creates a separate offence based on abuse of trust which is highly specific in its coverage. It criminalises an abuse of trust in certain designated situations involving 16 to 18 year old victims without reference to and irrespective of consent. It

<sup>73</sup> S.J. Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (1998) p.210-211.

<sup>74</sup> *Ibid* p.220.

<sup>75</sup> For a review of some of these studies see *ibid* pp.217.

<sup>76</sup> *Ibid* p.226.

<sup>77</sup> See e.g. “Woman Seeks Action Against Psychologist” *The Guardian*, June 4th 1999.

<sup>78</sup> Canadian Criminal Code, s.153.1(3)(c).

<sup>79</sup> Act 1900, s.92P.

<sup>80</sup> Criminal Code Act 1924 Schedule 1, Part 1, chap.1, s.2A (2)(b).

would be possible for this type of provision to be introduced for adults. That there should be criminal liability in certain situations involving the abuse of trust of vulnerable adults has been recognised in American law. For example, in Columbia sexual abuse of a patient or client is an offence punishable by a maximum of ten years imprisonment. D is liable if he “purports to provide in any manner, professional services of a medical, therapeutic or counselling nature and engages in a sexual act with another person who is a patient or client where the nature of the treatment or service provided and the mental, emotional or physical condition of the patient or client are such that D knows or has reason to know that the patient or client is impaired from declining participation in the sexual act.”<sup>81</sup> In Colorado, the crime of sexual assault in the third degree is committed where V is “in custody of law or detained in a hospital or other institution and D has supervisory or disciplinary authority over V and uses this position of authority, unless incident to a lawful search, to coerce V to submit.”<sup>82</sup> Schulhofer argues vigorously for the need for an abuse of trust provision to cover adults on probation or parole or detained in a hospital, prison or other custodial institution where D has supervisory or disciplinary authority over such persons or where D is engaged in providing professional treatment, assessment or counselling of a mental or emotional illness.<sup>83</sup>

The question which therefore arises is:

**What approach should the criminal law take to certain abuses of power and trust involving adult victims?**

**Absence of consent where V is asleep**

The common law has long recognised that consent is absent in this situation<sup>84</sup>. A statutory provision to this effect would help to clarify the scope of the offence of rape.

**Absence of consent where V is drunk**

Drink is very often a feature in rape cases. V may have drunk so much that she loses her inhibitions and becomes more willing than she might otherwise have been to have sexual intercourse. Alternatively she may have become so drunk as not to be capable of giving consent. In a rape trial, the defence will always seek to argue that the former was the case. The position of the common law is that it is rape for a man to have sexual intercourse with a woman who is insensible through drink<sup>85</sup> but there is a point well before this when V may be incapable of giving a true consent. The jury recognised this in *Malone*<sup>86</sup> where a sixteen-year-old girl was too drunk to walk and had to be carried home. She was too drunk to resist D or effectively to communicate her unwillingness to have intercourse with him even though she was aware of what he was doing. The Canadian law states that no consent is obtained where “V is incapable of consenting to the activity”.<sup>87</sup> Originally it had been proposed that the law should state that no consent is obtained where “V is incapable of consenting to the activity by reason of intoxication or other condition.”<sup>88</sup> But such a formula would not advance the current state of English law. In *Malone* it was stated:

<sup>81</sup> Criminal Code of the District of Columbia, Articles 22-4115 and 4116.

<sup>82</sup> Criminal Code, ch.171, 18-3-404.

<sup>83</sup> Schulhofer op.cit. pp.283-284.

<sup>84</sup> *Mayers* (1872)12 Cox C.C.311.

<sup>85</sup> *Camplin* (1845)1 Cox C.C.220.

<sup>86</sup> [1998] Crim. LR 834.

<sup>87</sup> Canadian Criminal Code s.153.1 (3)(b).

<sup>88</sup> Bill C-49, House of Commons of Canada, 34th Parliament, Third Session s.273.1(2) (b) (December.12th1991).



“It is not the law that the prosecution, in order to obtain a conviction for rape, have to show that V was either incapable of saying no or putting up some physical resistance or did say no or put up some physical resistance.”<sup>89</sup>

Kramer points out that the Canadian law suffers “from a lack of precision, failing to indicate what level of intoxication made V “incapable of consenting” and how the jury should judge V’s level of intoxication”<sup>90</sup>. It is preferable that legislation should simply convey that it is rape where consent is absent owing to V’s intoxication.

### **The consent of children**

Where rape is alleged against a child of any age it is still necessary to prove beyond reasonable doubt that the child did not consent. There is no automatic assumption that a child cannot consent to sexual intercourse. In the case of *Howard*,<sup>91</sup> which involved a six-year-old girl, Lord Parker, the Lord Chief Justice held that consent was to be assessed differently in the case of girls under 16. The prosecution would need to show that the victim’s understanding or knowledge was such that she was not in a position to decide. He held that “it would be idle for anyone to suggest that a girl of that age (i.e. 6) had sufficient understanding and knowledge to decide whether to consent or resist.”<sup>92</sup> However, he commented: “There are many girls under 16 who know full well what is happening and can properly consent.”<sup>93</sup>

It is not clear from this decision what it is that a child must fail to understand or know. Must she lack knowledge of the facts of life or an understanding of the significance of sexual relations before consent will be deemed to be absent? Today even fairly young children may know the facts of life but an understanding of the broader issues associated with sexual relations will be absent.

It is clear that no fixed standard by which consent can be judged has been set in the case of children under 16. Under present law, children under 10 years old cannot be liable for criminal offences but they can be held to have consented to sexual intercourse. It may be argued that pre-pubescent children are incapable of giving meaningful consent to sexual intercourse. This therefore raises the following issue for consideration:

### **Should the law set an age below which a child is deemed to lack the capacity to consent to sexual intercourse? If so, what should that age be?**

The setting of such an age would mean that a man having intercourse with a child below the given age would be guilty of rape provided that he had the necessary *mens rea*.

The Law Commission has approached the issue somewhat differently. It provisionally recommended that V should be regarded as lacking the capacity to consent if “she is unable by reason of age or immaturity to make a decision for herself on the matter in question”.<sup>94</sup> It recommends that V “should be regarded as unable to make a decision by reason of age or immaturity if at the time the decision needs to be made he or she does not have sufficient understanding and intelligence to understand the information relevant to the decision including

<sup>89</sup> [1998] Crim LR 834 at p.835.

<sup>90</sup> See Karen M. Kramer, “Rule by Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rapes”(1994) 47 Stanford Law Review 115 at p.151.

<sup>91</sup> [1965] 3 All E.R. 684.

<sup>92</sup> At p.685.

<sup>93</sup> *Ibid*.

<sup>94</sup> Law Commission Consultation Paper No 139, *op.cit.* p.57.

information about the reasonably foreseeable consequences of deciding one way or another.” In determining whether V has sufficient understanding and intelligence “a court should take into account his or her age and maturity as well as the seriousness and implications of the matter to which the decision relates.”<sup>95</sup>

There is a circularity about this recommendation. A person will be deemed to lack capacity to provide a valid consent if, by reason of age or immaturity, she is unable to make a decision. Immaturity is gauged by lack of understanding and intelligence. Understanding and intelligence are gauged by age and maturity as well as by the seriousness of the matter itself. The extent to which emotional as well as cognitive factors are to be taken into account in assessments of maturity is also not entirely clear. Thus a very bright 11-year-old might understand the implications of sexual intercourse but entirely lack the emotional maturity to make such a decision.

**The disadvantage of the Law Commission’s approach is that it would require an investigation into capacity in every case even those involving young children. Arguably in such cases an investigation is unnecessary and oppressive. One solution might be for an age to be set below which capacity to consent would be deemed to be absent in sexual matters. Above that age and below the age of 16 an amended version of the Law Commission’s capacity test could apply.**

### **The consent of the mentally impaired**

A similar problem arises with respect to people who are mentally impaired. Again it is presumed in law that they consent to sexual intercourse unless it can be proved beyond reasonable doubt to the contrary. Any notion of consent must comprehend some degree of knowledge and understanding on the part of the victim as to the type of act that D is contemplating. But how much knowledge and understanding is required? The law gives no firm answer on this. In *Fletcher*,<sup>96</sup> a nineteenth century case involving a mentally impaired 13-year-old girl, the view was expressed that the girl consented even if she merely acted out of “animal instinct”. Presumably this meant that no knowledge or understanding of the meaning or implications of sexual relations was necessary provided that she appreciated that D intended to insert his penis in her vagina. Palles C.B. in the later case of *Dee*<sup>97</sup> deplored this view. He held that,

“Consent is the act of man, in his character of a rational and intelligent being, not in that of an animal. It must proceed from the will sufficiently enlightened by the intellect to make such consent the act of a reasoning being.”<sup>98</sup>

The question is whether the standard suggested by Palles C.B. is too high and would interfere with the right of the mentally impaired to engage in sexual relations. Certainly this appears to have been the view taken by Professor Glanville Williams<sup>99</sup> who preferred the decision of the Supreme Court of Victoria in *Morgan*<sup>100</sup> which held that a woman must be regarded as having the capacity to consent to intercourse unless it is proved that she lacked the knowledge or understanding to comprehend either a) that the man intended to insert his penis into her vagina or, if that were not proved, that b) what was proposed was an act of sexual connection as distinct from an act of a totally different character. Thus, under b) if D has deceived V by telling her, for

<sup>95</sup> *Ibid* p. 57.

<sup>96</sup> (1859) Bell CC 63.

<sup>97</sup> (1884) 15 Cox CC 579.

<sup>98</sup> *Ibid.* p.593.

<sup>99</sup> G. Williams, *Textbook of Criminal Law* (1983) p.571.

<sup>100</sup> [1970] V.R. 337.



example, that what he intends to do is to perform an operation on her, consent will not be regarded as present. But V would not be required to understand, for example, that this was an act which could result in pregnancy or disease. The Morgan test is approved by Professor Williams on the ground that “a low requirement of understanding is necessary to prevent men who have intercourse with willing but sexually innocent girls from being convicted of rape.”<sup>101</sup> He also considered that such a low standard was necessary in order not to forbid sexual expression to women of subnormal intelligence”. He points out that there are statutory provisions which limit sexual relations with those whose intelligence and social functioning are “severely impaired”. What, however, of those women who do not meet the strict statutory criteria?

The problem at present is that the law does not appear to have set any clear standard for consent in the case of the mentally impaired.

The question therefore arises:

**In the case of mentally impaired people in what circumstances should the law state that consent is absent?**

The Law Commission has answered this question by provisionally proposing that a person should be regarded as lacking capacity to consent if he is unable by reason of mental disability to make a decision for himself on the matter in question.<sup>102</sup> Mental disability is defined as a disability or disorder of the mind or brain whether permanent or temporary which results in an impairment or disturbance of mental functioning. A person will be deemed to be unable to make a decision for himself on the matter in question if he is unable at the time to understand or retain the information relevant to the decision including information about the reasonably foreseeable consequences of deciding one way or another or he is unable to make a decision based on that information.<sup>103</sup>

This formula is designed to be used in relation to sexual offences and offences against the person. It is not entirely clear what information would be thought to be relevant to a decision to have sexual intercourse and whether the understanding and retaining of *information* is necessarily the issue in sexual offences. On the other hand, understanding reasonably foreseeable consequences would clearly be relevant. These might be thought to include the risk of pregnancy and disease. The Law Commission formula in practical terms would appear to add to the *Morgan*<sup>104</sup> formula (which it is assumed it would wish to incorporate) a requirement that the person concerned should understand the possible consequences of her decision. This does not set a particularly high standard – it is less demanding than the standard it proposes for children<sup>105</sup> – but the Commission was concerned to respect the choices made by the mentally disabled. It rejects the approach taken in Ireland where section 54 of the Criminal Law (Sexual Offences) Act 1993 contains an unqualified prohibition against sexual intercourse with a person who is mentally impaired.

**Residual cases**

It is difficult to predict all the situations which could arise where consent is the issue. In these residual situations the issue of consent could be left to the jury. The advantage of defining what is meant by consent, as in Canada and the Australian states mentioned above,<sup>106</sup> is that this definition does provide some starting point for the jury's deliberations.

<sup>101</sup> G.Williams, *op.cit.* p.571.

<sup>102</sup> Law Commission Consultation Paper, *op.cit.* p.56.

<sup>103</sup> *Ibid* at p.57.

<sup>104</sup> (1970) VR 337.

<sup>105</sup> See above under the heading “Consent of Children”.

<sup>106</sup> See under the heading “ Option 2: A Statutory Definition of Consent”.

### The mental element

Section 1(1) of the Sexual Offences Act 1956 makes it clear that D can be guilty of rape only if he knew that the other person was not consenting to sexual intercourse with him or else he was reckless as to whether that person was consenting or not. The term “reckless” has been interpreted in cases such as *Satnam and Kewa*<sup>107</sup> to mean that he could not care less whether the person was consenting or not. This formulation seems highly appropriate. Arguably it is precisely such an attitude of mind which the law should seek to punish and the language is robust enough for any jury to understand.<sup>108</sup> The Law Commission in its Draft Code adopted the recommendation of the CLRC that a man should be liable for rape where he is aware that V may not be consenting or does not believe that V is consenting.<sup>109</sup> Such a formulation would seem to cover, if less vividly, more or less the same ground as “could not care less”. A person who could not care less may not have given any thought to whether or not the other was consenting precisely because he could not care less. A person who does not believe the other is consenting may similarly have given no thought to the matter. Neither formulation is strictly in accordance with mainstream orthodoxy about the appropriate reach of the criminal law. This demands that those who have failed to think should not ordinarily be criminally liable. There will be few cases however of defendants who fail to think about whether the other person is consenting or not. This situation is perhaps most likely to occur where there has been some consumption of alcohol or drugs.

In an apparent rejection of mainstream orthodoxy, the Law Commission in its Consultation Paper on Consent has stated that a failure to address one’s mind to the issue of whether a woman is consenting or not is “a violation of her rights, in that it fails to give proper value to her existence as a human being and thereby to accord her full human status”.<sup>110</sup> This view is particularly pertinent given the Review’s concern with issues of autonomy.

More controversial is the issue of whether D who mistakenly believes that the other person is consenting when he has no reasonable grounds for this belief should be criminally liable. The present law answers this question in the negative as a result of the endorsement by the Sexual Offences (Amendment) Act 1976<sup>111</sup> of the decision in *Morgan V DPP*.<sup>112</sup> New Zealand has rejected this approach requiring that belief in consent be reasonable and this is the position in the Code jurisdictions of Australia viz Queensland, Western Australia, the Northern Territories and Tasmania.<sup>113</sup> *Morgan* has not found favour in American law either. As Thomas O’Malley has noted, it is mostly lawyers who favour *Morgan*.<sup>114</sup> But public reaction at the time of the decision was overwhelmingly negative. *Morgan* represented the triumph of a few influential academic lawyers.

<sup>107</sup> (1984) 78 Cr. App. R.149.

<sup>108</sup> It is of interest that strong support for this formula was expressed by judges and practitioners attending the Legal Practitioners’ Conference held by the Home Office in connection with this Review on the ground that it was simple for juries to understand.

<sup>109</sup> CLRC Report, op.cit. paras. 2.38-9; Law Commission, *A Criminal Code for England and Wales* (1989), Law Com. No 177, clause 89, p.76.

<sup>110</sup> Consultation Paper No.139 op.cit. at p.95.

<sup>111</sup> Section 1.

<sup>112</sup> [1976] AC 182. A person who could not care less whether she is consenting or not might simultaneously have a belief in consent but would still not be guilty. See S. Shute “The Second Law Commission Consultation Paper on Consent” [1996] CrimL R684 at p.687.

<sup>113</sup> New Zealand Crimes Amendment Act (No.3) 1985 amending s.128 of the Crimes Act 1961; QLD Criminal Code s.24; WA Criminal Code s.24; Tasmania Criminal Code s.14; Northern Territories Criminal Code s.32.

<sup>114</sup> *Sexual Offences: Law, Policy and Punishment* (1996) p.55.



The negative implications of *Morgan* are demonstrated by the following four examples of cases in which a man could be acquitted under the present law:<sup>115</sup>

1. D has sexual intercourse with V at the invitation of another man, X. V struggles and protests but X explains that this is mere play-acting and D believes him;
2. V explicitly states that she does not consent and attempts to resist. D, because of his superior strength, is able without much force to overcome her. He, believing that women always behave in this way, interprets her no as yes and her resistance as token;<sup>116</sup>
3. D has so terrified V by his conduct that V dare not register her non-consent. He may, for example, have broken into her home or violently assaulted her before attempting to have sexual intercourse. He interprets her lack of protest as consent;
4. V is a child or mentally disabled.

The Law Commission considered these examples.<sup>117</sup> It invited views on a proposal that the law should be changed so that D would be held liable for rape if he has sexual intercourse with V who does not consent where he does not realise that V does not consent but that fact should be obvious to him and he was capable of appreciating that fact.<sup>118</sup> The problem with this formulation is that it would not necessarily cover two of the examples listed above.

In the first example where X has explained to D that V is playacting it is not clear that V's non-consent should necessarily be obvious to D. Sado-masochism is practised by some and D may believe what he has been told. Of this example, the Law Commission comments:

“If he chooses to ignore the woman's actual response in favour of what someone else has told him, he must take the consequences because his conduct involves a denial of her autonomy and a lack of respect for her status as an individual with a will of her own.”<sup>119</sup>

It would seem to follow from this that the law should require that D should make it his business to find out whether or not she is truly consenting by asking her but the Law Commission's formula falls short of doing so.

Similarly, in the fourth example, it may not be obvious that a child or a mentally disabled person is not consenting where either fails to demonstrate any lack of consent. If the law is to protect the vulnerable, this is unsatisfactory.

Toni Pickard has pointed out that it is not unreasonable for the law to require that D should take steps to ascertain whether consent is present. After all, V is next to him. He has only to ask.<sup>120</sup> There is a strong argument for the law to deny a defence of mistaken belief to a person who has failed to take such a modest step.

<sup>115</sup> J. Temkin, *Rape and the Legal Process* (1987) p.81.

<sup>116</sup> Of this example, the Law Commission comments: “He is relying on an attitude towards other people which is no longer acceptable. The question is whether society should state clearly that a man who ignores a woman's express refusal will not be permitted to claim that he did not think she meant it.” Law Commission Consultation Paper No 139, *op.cit.* at para. 7.19.

<sup>117</sup> Law Com. Consultation Paper No.139, *op.cit.* paras. 7.10-7.24

<sup>118</sup> Para. 7.24.

<sup>119</sup> Para. 7.19.

<sup>120</sup> “Culpable Mistakes and Rape: Relating Men Rea to the Crime” (1980) 30 U of Tor LJ 75.

In Canada the Code requires that if D argues belief in consent he must have taken all reasonable steps in the circumstances known to him at the time to ascertain whether V was consenting before he can be acquitted<sup>121</sup>. However, if relevant circumstances were not known to D at the time when, given his capacities they should have been, this would seem to take him outwith this provision. For example, D could argue that he did not know that V was mentally disabled even though he should have realised this. Moreover, such a provision on its own is not sufficient. D may take steps which would be deemed to be reasonable to ascertain consent but nevertheless, having done so, wrongly and negligently conclude that V is consenting. Thus, in example 2, a man who believes that women say no when they mean yes might persist in believing consent is present even when the woman has assured him it is not. The weakness of the Canadian provision is illustrated by the fact that the *Morgan* decision still applies in Canada so that belief in consent in these circumstances would still lead to an acquittal.<sup>122</sup>

The simplicity of the New Zealand provision has much to commend it. A mistake as to consent has to be reasonable before it can result in an acquittal.<sup>123</sup> The problem is that it leaves what is reasonable undefined. It is to be hoped that a jury would find that D's mistake was unreasonable in examples 1-3. There could however be difficulties in example 4. Belief on reasonable grounds does not necessarily require D to have asked V directly. It might also be objected that a purely objective test pays insufficient heed to the particular capacities of D who may himself be mentally impaired. An alternative possibility would be for the law to state that a defence of mistaken belief must be based on reasonable grounds and that mental impairment and age should be taken into account when assessing reasonableness. This defence should not, however, apply where there has been a failure to take steps to ascertain from V herself whether or not she is consenting in circumstances where it should have been obvious to D that she might not be consenting. Again mental impairment and age should be taken into account in assessing what is obvious.

The issues for the review are:

**1 Should the meaning of recklessness evolved by the common law in rape cases viz. that D is reckless if he could not care less whether V is consenting be retained?**

**2 Should the decision in *Morgan* be retained? If not how should the law be reformulated?<sup>124</sup>**

### **Procuring sexual intercourse by threat**

Section 2 of the Sexual Offences Act 1956 makes it an offence for a person to procure a woman by threats or intimidation to have unlawful sexual intercourse in any part of the world. It is an offence that is either never or almost never used. Home Office figures demonstrate that in 1987 there were five convictions for a group of four offences of which section 2 was one and section 3, discussed below, another. In 1992 there were six convictions and in 1997 there were seven.<sup>125</sup> It is only possible to speculate on the reasons why this offence is not employed more often. It may be that women are disinclined to report to the police when they have been forced into sexual intercourse by threats other than of violence. This could be because they do not realise that such conduct is covered by the criminal law or because they would rather pursue civil remedies or

<sup>121</sup> s.153.1 (5) (b).

<sup>122</sup> See Martin's Criminal Code (1995) p.446. The decision of the Canadian Supreme Court in *Pappajohn* (1980) 52 CCC (2d) 481 which was similar to *Morgan* in its approach has not been affected by s.153.1 (5) (b) of the Code as is made plain by s.153.1 (6).

<sup>123</sup> Crimes Act 1961, s.128(2) (b).

<sup>124</sup> This issue is particularly pressing given the Youth and Criminal Evidence Act 1999 which will permit the use of sexual history evidence where a *Morgan* defence is argued.

<sup>125</sup> Unpublished figures supplied by the Home Office Research Development and Statistics Directorate.



because they treat such behaviour with resignation. It is also possible that where threats have been made, prosecutors prefer to charge defendants with rape given the potential scope of the decision in *Olugboja*<sup>126</sup> or that where the threats are non-violent they do not consider prosecution to be appropriate. Alternatively, judges may be reluctant to direct juries that if they find D not guilty of rape, they may find him guilty of the Section 2 offence, in case juries would be too inclined to convict for the lesser offence.

Yet this moribund offence could have a vital role to play in the protection of sexual autonomy. Clearly, where sexual intercourse is obtained by threats or intimidation, this is the very negation of autonomy. The CLRC expressly recognised the value of the offence “in the protection of women” and recommended simply and briefly that the offence be retained in its present form with an increased penalty of five years’ imprisonment.<sup>127</sup> This recommendation is embodied in the Law Commission’s Draft Criminal Code.<sup>128</sup> In its subsequent Consultation Paper on Consent, the Law Commission considered the notion of threat both in the context of sexual offences and offences against the person.<sup>129</sup> Its main concern was to address certain philosophical arguments about the nature of a threat and distinctions between threats, inducements and coercive offers. It was keen to ensure that a line be drawn so that only certain threats should be capable of giving rise to criminal liability. However its discussions do not reveal any way in which such a line could convincingly be drawn. There is insufficient recognition in the discussion of the importance of the principle of sexual autonomy and that the use of coercion is entirely antithetical to this. On the contrary, it appears to suggest that it is legitimate in some circumstances to use threats to obtain sexual intercourse. Whereas almost any threat is regarded as sufficient for criminal liability if it results in submission to injury the same is not apparently considered to be the case if it procures submission to intercourse.<sup>130</sup> Thus the harm of injury unwillingly incurred is regarded more seriously than the harm of unwilling submission to intercourse. The discussion gives every impression of seeking to protect men who use a variety of means of coercion to obtain sex with women so that only the most extreme forms of coercion are covered. However, in the case of learning disabled victims, even the most trivial threats may be sufficient to procure intercourse.

The Law Commission proposes that the rules relating to consent in offences against the person and sexual offences should be the same.<sup>131</sup> It suggests the creation of the following new offence to apply where D has inflicted injury on V:

“It should be an offence, punishable on conviction on indictment with five years imprisonment, for a person to do any act which, if done without the consent of another, would be an offence so punishable,<sup>132</sup> having procured that other’s consent by threats; but a person should not be guilty of the suggested offence if –

- a) in all the circumstances the threat is(or, perhaps, the D believes that it is) a proper way of inducing the other person to consent to the act in question; or
- b) The threat is to withhold a benefit which the other person could not reasonably expect to receive.<sup>133</sup>

<sup>126</sup> [1981] 3 All ER 443.

<sup>127</sup> CLRC Report paras. 2.106 and 2.113.

<sup>128</sup> Law Com. Draft Criminal Code, *op.cit.* Clause 90.

<sup>129</sup> Consultation Paper No.139, *op.cit.* paras. 6.38-6.72.

<sup>130</sup> See para. 6.51.

<sup>131</sup> Para. 6.78.

<sup>132</sup> The Commission proposes that the infliction of any injury with consent should not be an offence unless it is seriously disabling injury: see paras. 4.29 and 4.49.

<sup>133</sup> Para. 6.89.

It is plain that this offence does not replicate section 2 which has the advantage that it focuses purely on the use of threats and intimidation, thus circumventing complicated consent issues. But if the law relating to threats were to be the same in both areas of law section 2 would need reformulation. However, it is most doubtful that the proposed new offence would provide a suitable model for use in the area of sexual offences.

The incorporation of paragraph a) would certainly be undesirable. The law should never concede that it is proper to obtain sexual intercourse by threat nor should it give support to those who believe that it is. There would also be several objections to the incorporation of paragraph b). The use of any form of coercion should not be subject to a blanket exclusion. A person who is in a position to withhold a benefit is a person who is in a position of power vis a vis the other and by offering threats of this kind is abusing that power in order to obtain a benefit for himself. There is no reason why abuses of power of this kind should necessarily be excluded. The question of what is a benefit to V as against a detriment and what is a benefit which V could not reasonably expect to receive raises complicated issues. In the employment context, such questions would involve careful scrutiny of the terms of an employee's contract and job record. If V is threatened by her boss that he will not raise her salary, this would involve an enquiry into the terms of her contract and whether or not her performance at work has been such that she could or could not reasonably expect to receive increased remuneration. This is an entirely inappropriate exercise for a criminal court and for a jury. Moreover, at a time in England and Wales when there is an unprecedented lack of job security, a threat to sack an employee could in some circumstances be viewed as a threat to withhold the benefit of a job to which V has no right and therefore can have no reasonable expectation of retaining. It would be wrong for such a threat to be excluded.

It is clear that a modern offence to deal with attempts to procure sexual relations by coercion is needed. Section 2 is an antiquated provision which was introduced in the 19th century as part of a series of measures to combat the white slave trade.<sup>134</sup> At the very least, it is seriously in need of redrafting. A new offence of sexual coercion would seek to protect males as well as females inside and outside marriage from coercive sexual relations. The offence should cover sexual acts which are included within the definitions of indecent assault and rape. The CLRC did not consider that the offence should go as far as this. It proposed that s.2 be retained in its present form but recommended that a separate offence be created, also punishable with five years' imprisonment, for a person to procure an act of gross indecency by threats or intimidation.<sup>135</sup> The term gross indecency has no statutory definition and case law similarly provides little in the way of definition. The Wolfenden Committee noted that it generally takes three forms: mutual masturbation, oral genital contact or some form of intercrural contact falling short of buggery or attempted buggery.<sup>136</sup> But it is not clear why other acts of indecency should be excluded.

If it is felt to be necessary to place some boundaries on the concept of threat, there is much to be said for a broad formula based upon Professor J.C. Smith's approach to the definition of menaces in the crime of blackmail.<sup>137</sup> Thus it would become an offence to use threats to obtain sexual relations. A threat would be sufficient if, in the circumstances known to the accused it might 1) influence the mind of an ordinary person of normal stability and courage whether or not it would influence V or 2) influence the mind of V, though it would not influence an ordinary person. It could be a useful supplement to add, by way of example, an inexhaustive list of threats covered by the offence that would provide guidance for prosecutors as well as the public. Such a list might include threats to accuse V or a third party of a criminal offence or other dishonourable conduct, to expose damaging secrets concerning her or a third party or to deprive her of her employment.

<sup>134</sup> See G. Williams, *Textbook of Criminal Law* (1983) p.558.

<sup>135</sup> CLRC Report, *op.cit.* para. 4.31 (4).

<sup>136</sup> Cmnd. 247 (1957), p.38.

<sup>137</sup> *The Law of Theft*, 8th ed., (1997) para. 10-09.



The New Zealand law provides an alternative approach.<sup>138</sup> It makes it an offence with a maximum penalty of 14 years' imprisonment to induce sexual connection by coercion. The offence applies in three situations only:

- 1) where there is a threat to commit an imprisonable offence which does not involve actual or threatened force;
- 2) where there is a threat to make an accusation or disclosure about misconduct, whether true or false that is likely seriously to damage reputation;
- 3) where there is a threat to make improper use to the detriment of the other person of any power or authority arising out of any occupational or vocational position held by D or any commercial relationship existing between D and V.

Since the penalty is high the offence is narrowly constructed. It might be thought that its ambit is too narrow.

The issues to be resolved in this area are:

**1. On the assumption that it is necessary to retain an offence to deal with the procuring of sexual intercourse by threat, should the law seek to place any limits on the type of threat which will suffice for the offence?**

**2. To what sexual acts should such an offence apply?**

**3. Should a non-exhaustive list of situations in which the offence applies, an exhaustive list or no list be provided?**

#### **Procuring a woman by false pretences**

Section 3 of the Sexual Offences Act 1956 makes it an offence for a person to procure a woman by false pretences or false representations to have unlawful sexual intercourse in any part of the world. It has been noted above<sup>139</sup> that it is an offence which is virtually defunct and yet it ought to have a vital role to play in the protection of sexual autonomy which is seriously undermined where an individual is tricked into sexual relations. The CLRC proposed that the offence be retained in its present form save that the words false pretences or representations be substituted by the word deception which has a wider ambit.<sup>140</sup> It proposed that the penalty for the offence should remain a maximum of two years' imprisonment. It did not propose that the offence be extended to cover any other sexual acts than vaginal penetration by the penis nor did it recommend that the offence be extended to protect male victims.

It seems clear that equal protection should be afforded to male and female victims by this provision. There also seems to be no reason why only sexual intercourse should be covered. The equivalent provision in Victoria, for example, extends to all acts of penetration.<sup>141</sup> But a woman who is tricked into having her breasts or vagina examined by a man who falsely claims that he is a doctor should arguably also be protected by the law.<sup>142</sup> Thus the present law could be revised so that it would become an offence for a person by deception to procure sexual intercourse or a sexual act

<sup>138</sup> Crimes Act 1961, s.129A.

<sup>139</sup> Under the heading "Procuring Sexual Intercourse by Threat".

<sup>140</sup> CLRC Report, *op.cit.* para. 2.113 (2).

<sup>141</sup> Crimes (Sexual Offences) Act 1991, s.57.

<sup>142</sup> This could however be regarded as a situation in which consent is vitiated so that the crime of indecent assault is committed: see the discussion *supra* under the heading "Consent obtained by Fraud".

with another person. Deception could be defined as under s.15 (4) of the Theft Act 1968<sup>143</sup> and sexual intercourse and sexual acts could be defined to include conduct that is presently covered by rape and indecent assault. A maximum penalty of two years' imprisonment would seem to be far too low to cover the most serious cases. The penalty could be raised to five years in line with the proposed penalty for procuring sexual intercourse by threat. The Law Commission considered that matters of fraud should be similarly treated in the context of offences against the person and sexual offences and has provisionally proposed an offence to deal with the infliction of injury by fraud which resembles the proposal made here.<sup>144</sup> It would be possible for a non-comprehensive list of situations covered by the offence to be added to the provision to provide guidance to prosecutors and public.

The Law Commission was concerned about the situation in which a woman, by fraud as to her HIV status, induces a man to have sexual intercourse. It therefore sought views as to whether a new offence should be created to deal with this situation.<sup>145</sup> However, if the present law is adapted in the way which has been proposed here, there is no reason why a woman who practices a deception of this kind should not equally be covered.<sup>146</sup>

Section 3 does not cover situations where D has not practised a fraud so that if he knows that V is mistaken about a matter and does nothing to disabuse her, he would not be liable.<sup>147</sup> The essence of the Section 3 offence is procurement by fraud. It is not an offence based on consent. Mistake alone is therefore irrelevant to it. The same would be true of the offence proposed here. It might be thought, therefore, that a separate offence would be required to deal with situations where D exploits V's mistakes. The CLRC did not consider this possibility which might be thought to be taking the law in too complicated a direction.

The issues for the Review would therefore seem to be:

1. Should the words false pretences and false representations in Section 3 be substituted for the word deception as defined by section 15(4) of the Theft Act 1968?
2. To what sexual acts should section 3 apply?
3. Should a non-exhaustive list of situations in which the offence applies, an exhaustive list or no list be provided?
4. Should the penalty for Section 3 be raised to five years?

<sup>143</sup> This provides that a deception means "any deception (whether deliberate or reckless) by words or conduct as to fact or as to law including a deception as to the present intentions of the person using the deception or any other person."

<sup>144</sup> See Law Comm. Consultation Paper 139, *op.cit.* paras. 6.18 and 6.81-2. It is proposed that a person should be guilty of an offence, punishable with five years' imprisonment, if he or she does any act which, if done without the consent of another, would be an offence so punishable and he or she has procured that other's consent by deception. Deception is defined as in note 143.

<sup>145</sup> Law Commission .Consultation Paper No.139, *op.cit.* paras. 6.20-6.21.

<sup>146</sup> But see note 72.

<sup>147</sup> It is possible, however, by analogy with the cases of *Charles* [1976] 1 All ER 659 and *Lambie* [1981] 1All ER 332, that a failure to disclose certain material facts could be regarded in some cases as a deception.



## 2. INDECENT ASSAULT ON A WOMAN

Under section 14 of the Sexual Offences Act 1956 it is an offence to indecently assault a woman. The offence covers a diverse range of behaviour from the relatively minor, such as bottom pinching, to the very serious, such as vaginal or anal penetration by a bottle or other object. The issue of whether some of the conduct which it covers is best subsumed within the offence of rape has been discussed above. The elements of the *actus reus* of the crime are that there has to be an assault or a battery in circumstances of indecency. Where a person over 16 is the victim it must be proved that consent was absent. There is no such requirement where a girl under 16 is involved.

### Recorded Offences, Prosecutions and Convictions

Since 1987 when 13,340 offences were recorded, the number of recorded offences of indecent assault has increased each year apart from 1995 rising to 18,674 in 1997.<sup>148</sup> However the number of prosecutions has not kept pace with this rise. Whilst 3131 persons were proceeded against in 1987,<sup>149</sup> 3430 persons were proceeded against in 1997.<sup>150</sup> Thus, if the number of persons proceeded against in 1987 is taken as a proportion of recorded offences in that year the result is 24% as against 18% in 1997. In 1987 there were 2315 convictions<sup>151</sup> with 2484 in 1997.<sup>152</sup> The proportion of offences resulting in convictions has remained the same. 74% of persons proceeded against were convicted in 1987 as against 73% in 1997.

### Penalties and Sentencing

The crime is punishable with a maximum penalty of ten years' imprisonment. This means that a man who engages in sexual acts with a girl under 16 where these acts fall short of intercourse is potentially liable to a maximum penalty of ten years whereas if he has sexual intercourse with her and she was between 13 and 16 years old the maximum penalty would be two years.

In 1997, of those sentenced to unsuspended imprisonment, the average sentence length was 26 months for a male convicted of the offence in the Crown Court.<sup>153</sup> 14 males received sentences of over 7 and up to 10 years.<sup>154</sup> In the Magistrates Court the most common sentence was a probation order. 88 males were fined. Only 14% received sentences of immediate imprisonment.<sup>155</sup>

<sup>148</sup> Home Office, Criminal Statistics England and Wales 1997 Cm 4162 (1998), Table 2.15.

<sup>149</sup> Home Office, Criminal Statistics England and Wales Supplementary Tables 1987 Vol.1 (1988) Table s1.1(A).

<sup>150</sup> Home Office, Criminal Statistics England and Wales, Supplementary Tables 1997 Vol. 1 and 2, Proceedings in Magistrates Courts, Table s1.1(A)

<sup>151</sup> Home Office Criminal Statistics England and Wales Supplementary Tables 1987 Vol.1 (1988) Table s1.1(A) and Vol. 2 (1988) Table s2.1(A).

<sup>152</sup> Ibid. Annex A, p.3.

<sup>153</sup> Criminal Statistics Supplementary Tables 1997, op.cit. S2.4, p.53.

<sup>154</sup> Ibid.

<sup>155</sup> Ibid Table s1.1 (a) p.7.

## Consent

Consent has a similar meaning in this context as it has in rape. The approach favoured in *Olugboja*<sup>156</sup> was specifically applied to indecent assault in *McAllister*.<sup>157</sup> The arguments canvassed above with respect to consent in rape would apply equally to indecent assault and any changes in the law should treat the offences in the same way.

## Mens Rea

S. 14 is silent as to the mens rea of the offence. However, in *Kimber*,<sup>158</sup> it was assumed that the decision in *Morgan*<sup>159</sup> applied equally to indecent assault. It must be assumed that D will be liable where he knows that V is not consenting or is reckless whether she is consenting or not and that the approach to recklessness in *Satnam*<sup>160</sup> would also apply in this context. Issues relating to reform of the law in this area discussed above apply here as well.

There seems to be no requirement that D himself should realise that the acts he was committing were or might be indecent provided that he intended to commit them. The test is an objective one.<sup>161</sup> It is sufficient that what occurred was so offensive to contemporary standards of modesty and privacy as to be indecent. However, a difficulty arises where D's actions are not obviously indecent but may be regarded as equivocal. In *Court*,<sup>162</sup> D put a 12-year-old girl over his knee and smacked her on top of her shorts. On the face of it, this was merely a battery. However, when asked to explain himself, he answered "Buttock fetish". The House of Lords held that where the actions of D are equivocal, his purpose and motive must be established in order to gauge whether an indecent assault has been committed or not. Had Court's motivation remained unconscious, he would have been guilty of battery and liable to a maximum penalty of six months' imprisonment. His own insight into his motivation resulted in a conviction of indecent assault with a maximum penalty of ten years. It is not clear that this can be justified. It is of interest that this approach has been specifically rejected in the Sexual Offences (Amendment) Bill 1998 which states that "sexual activity does not include any activity which a reasonable person would regard as sexual only with knowledge of the intentions, motives or feelings of the parties."<sup>163</sup>

## Girls under 16

The CLRC considered whether a new offence should be created to cover indecent acts with girls under 16 which would then be removed from the scope of the Section 14 offence. This would be in line with the existence of an offence of rape on the one hand and separate offences of unlawful sexual intercourse on the other. It recommended that a new offence should be created and proposed that it should be an offence for a person to commit an act of gross indecency with or towards a child under 16.<sup>164</sup> The penalty would be a maximum of five years where the child is under 13 and two years where the child is between 13 and 16. This would bring back the penalty structure which existed prior to 1985.

<sup>156</sup> [1981] 1 W.L. R.1382.

<sup>157</sup> [1997] Crim.LR 233.

<sup>158</sup> [1983] 3 All ER 316.

<sup>159</sup> [1976] A.C.182.

<sup>160</sup> (1984)78 Cr. App. R.149.

<sup>161</sup> *R v C* [1992] Crim LR 642.

<sup>162</sup> [1988] 2 All ER 221. |.

<sup>163</sup> Clause 2 (5).

<sup>164</sup> CLRC Report, *op.cit.* para. 7.28.



This proposal must be regarded as controversial for a number of reasons:

1. It would decriminalise conduct which is indecent and which is presently covered by the law and confine the offence to acts which are grossly indecent. This means that, for example, certain acts of touching, fondling or kissing a young girl would cease automatically to be criminal. If the purpose of the Review is, in particular, to protect children, this proposal may not commend itself. Since the CLRC prefaced its remarks by noting that prosecutions under the present law are mostly confined to situations where older men are involved with younger girls and that it was very rare for young men to be prosecuted, the proposal that the law be narrowed in this way is all the more surprising. Such a change in the law at the present time would be likely to be regarded as a paedophile's charter. Moreover, the Government's proposed abuse of trust provision would criminalise all sexual activity not just acts of gross indecency.<sup>165</sup> It would seem strange if persons between 16 and 18 were afforded greater protection than those under 16.
2. The term "gross indecency" is archaic, uncertain in its scope and unintelligible to the layman. It is clear that the term did not find favour with all members of the CLRC or the PAC.<sup>166</sup> On the other hand it is used under the Indecency with Children Act 1960. Other proposals were judged by the CLRC, probably correctly, to be unsatisfactory, for example, a test based upon the areas of the girl's body that it would be an offence to touch.<sup>167</sup> By contrast, the current law which rests on the notion of assault is relatively clear in its scope.
3. At present the only defence to a charge of indecent assault involving a girl under the age of 16 is that D believed on reasonable grounds that he had been through a valid ceremony of marriage with her.<sup>168</sup> Whilst wishing to retain this as a defence, the CLRC recommended that it should also be a defence to such a charge that D believed the girl to be 16 or over. Reasonable grounds for either belief should not be required.<sup>169</sup> This would considerably weaken the protection which the law currently affords to children. Indeed, it is likely to render the law unenforceable.<sup>170</sup>
4. The penalty structure for the proposed offence would ensure that, for example, acts of oral sex or penetration with objects perpetrated upon a 13 year old girl by an older man would be punishable with a maximum of two years' imprisonment. Whilst this would bring the penalty structure in line with that for USI, it might be thought that it is the present penalty for USI which should be raised.

There seems little justification for the radical change in the law proposed by the CLRC and it is not surprising that no attempt has been made to implement it. The virtue of the present law is that its scope is relatively clear. If the objection to the present law is that it appears to characterise some consensual conduct between young people as an indecent assault and to render criminal minor acts of intimacy between young people, the answer is that young people do not fear prosecution where they indulge in such behaviour because prosecutions are not brought in these situations.

<sup>165</sup> Sexual Offences (Amendment) Bill 1998, Clause 2.

<sup>166</sup> CLRC Report, *op.cit.* para. 7.14.

<sup>167</sup> *Ibid* para. 7.19.

<sup>168</sup> Sexual Offences Act 1956, s.14 (3).

<sup>169</sup> CLRC Report, *op.cit.* para. 7.27.

<sup>170</sup> For further discussion of this issue, see below under the heading "Sexual Intercourse with Young Girls".

## Should there be two degrees of indecent assault?

The second issue considered by the CLRC was whether the current offence of indecent assault should be divided into two degrees given the range of conduct which the offence now covers.<sup>171</sup> The main problem is that in addition to sexual touching, indecent assault encompasses very grave assaults involving penetration by objects and parts of the body other than the penis as well as acts of oral sex. If rape were extended to cover such conduct then there would be no scope for a division of the offence. If, on the other hand, rape remains as it is or, alternatively, is extended to cover some but not all of these acts, there is a case for creating an aggravated form of indecent assault based on penetration. Thus if it was felt that rape should be confined to acts of penile penetration so that men alone can be principal offenders, the aggravated form of indecent assault could encompass penetrative acts performed with objects or other parts of the body as well as cunnilingus. The CLRC considered that an aggravated offence based on penetration would have the advantage of simplicity but would “be open to the charge of concentrating unduly upon one physiological aspect and fostering the unfortunate impression that any indecent assault lacking penetration is trivial.”<sup>172</sup> It therefore rejected this idea. It is clear that a two tier offence does carry with it the danger that conduct which is relegated to the second tier will be regarded as trivial whatever the basis of the first tier offence. The CLRC also considered whether an aggravated offence could be based on a list of aggravating factors such as the infliction of violence, or the presence of others or the commission of additional acts calculated to humiliate the victim as is the case in Victoria, Australia.<sup>173</sup> It concluded, however, that these factors were appropriate as sentencing considerations but could not suitably demarcate an aggravated form from a lesser offence. It finally considered combining penetrative acts with aggravating factors to produce an aggravated offence. Thus it was proposed that the offence would consist either of penetrative acts or of assaults accompanied immediately before or afterwards by an act which was likely seriously and substantially to degrade or humiliate the victim.<sup>174</sup> It was felt however that the words “degrade or humiliate” lacked the certainty required for criminal law and could lead only to confusion. The CLRC finally conceded defeat and made no recommendation on this matter concluding that there was no obvious way of dividing up the offence.

Since many crimes cover acts of varying seriousness, a division of the offence into degrees is not necessarily essential. In the event, however, that rape is kept in its present form or subsumes some but not all acts of penetrative sex, there is a case for raising the maximum penalty which in turn may strengthen the case for a two-tier offence.

## Is the term indecent assault appropriate?

The language of this offence is open to criticism. To describe certain acts of brutality as indecent assaults is to downgrade their serious nature. The term sexual assault is more in accordance with modern legislation in other countries. The Sexual Offences (Amendment) Bill 1998 defines sexual as “any activity which a reasonable person would regard as sexual in all the circumstances”.<sup>175</sup>

<sup>171</sup> CLRC Report, *op.cit.* paras. 4.9-4.24.

<sup>172</sup> *Ibid.* para. 4.19.

<sup>173</sup> *Ibid.* para. 4.20.

<sup>174</sup> *Ibid.* para. 4.22.

<sup>175</sup> Clause 2 (5) (b).



The issues which need to be considered by the Review are therefore:

1. **Should the law of indecent assault still apply to girls under 16 or should a new offence be created to deal with girls under this age. If so what ought the scope of this offence to be?**
2. **Should there be different degrees of the offence?**
3. **Should the offence continue to be called indecent assault?**
4. **What should be the maximum penalty for cases involving girls under 16?**
5. **Should there be a defence based on lack of knowledge of age?**
6. **Should equivocal acts count as indecent assaults if they are accompanied by a sexual motivation?**

### 3. INCEST

The crime of incest is now contained in sections 10 and 11 of the Sexual Offences Act 1956. Section 10 provides that it is an offence for a man to have sexual intercourse with a woman whom he knows to be his granddaughter, daughter, sister or mother. Section 11 provides that it is an offence for a woman of the age of 16 or over to permit a man whom she knows to be her grandfather, father, brother or son to have sexual intercourse with her by consent. Sister includes half sister and relationships need not be legitimate. Consent is no defence. The maximum penalty is 7 years imprisonment or life where the girl is under 13.

#### Recorded Offences, Convictions and Sentencing

Since 1987 there has been an almost annual decline in the number of recorded offences of incest. In 1987, 511 offences were recorded by the police. By 1997 this figure had dropped to 183 whilst the figure for 1996 was 157.<sup>176</sup> The explanation for this is unclear. It is possible that more such offences are being recorded as rape. The number of persons prosecuted and convicted for incest has seen an even more dramatic decline. In 1987 there were 195 prosecutions.<sup>177</sup> By 1997 this figure had fallen to 33.<sup>178</sup> In 1987 there were 194 convictions for incest,<sup>179</sup> a figure which had fallen to 39 in 1997.<sup>180</sup> 27 of those convicted for incest in 1997 were sentenced to unsuspended imprisonment with an average sentence of 49 months.<sup>181</sup>

#### Should the crime of incest be retained?

There is a vast literature on the law of incest. In the light of what is now known about sexual abuse much of this writing would be regarded as offering suggestions of an entirely unacceptable nature. In 1974, for example, DJ West advocated the abolition of the offence commenting that incest was not necessarily harmful.<sup>182</sup> Many other writers have also advocated the abolition of the offence.<sup>183</sup> The argument would appear to be that where sexual intercourse takes place with a girl under 16 the law already deals with the situation. Where a girl is over 16, there is no need for the law to intervene. Today it is widely recognised that young people within the home are vulnerable and need protection. The Government's proposed abuse of trust provision is clearly premised on the assumption that the law will continue to offer protection to young people over 16 from sexual abuse by family members.<sup>184</sup>

Other writers have confined their abolitionist agenda to sibling incest proposing that intercourse between siblings over 16 should cease to be covered by the offence.<sup>185</sup> Again more recent research

<sup>176</sup> Criminal Statistics 1997, *op.cit.* Table 2.16.

<sup>177</sup> Criminal Statistics Supplementary Tables 1987 Vol. 1 Table S1.1(A).

<sup>178</sup> Criminal Statistics Supplementary Tables 1997 *op.cit.* Table S1.1(A).

<sup>179</sup> Criminal Statistics Supplementary Tables 1987 Vol. 1 Table S1.1(A) and Vol. 2 Table S2.1(A).

<sup>180</sup> *Ibid* Table S2.1(A).

<sup>181</sup> *Ibid* Table S2.4.

<sup>182</sup> D. J. West, "Thoughts on Sex Law Reform", in *Crime, Criminology and Public Policy* (R., Hood ed.1974) p.481.

<sup>183</sup> See J. Temkin, "Do We Need A Crime of Incest" (1991) 44 *Current Legal Problems* 185.

<sup>184</sup> Sexual Offences (Amendment) Bill 1998, Clause 2.

<sup>185</sup> See e.g. Bailey and McCabe, "Reforming the Law of Incest" [1979] *Crim. LR* 749.



into the extent of sexual abuse perpetrated by young people against other young people would counsel against such a proposal.<sup>186</sup>

Both the CLRC and the Scottish Law Commission<sup>187</sup> accepted that the offence should be retained. On the assumption that the Review will seek to retain it, its present form requires analysis.

### **Should the crime of incest include other sexual acts?**

At present only sexual intercourse is covered by the offence reflecting eugenic considerations. If the offence is one which is considered to have more than a eugenic justification, then there is a clear argument for extending its scope to cover acts other than intercourse. Sexual abuse perpetrated by family members is by no means confined to sexual intercourse.<sup>188</sup> The law of incest in Victoria covers the introduction of the penis into the vagina, anus or mouth and the introduction of an object into the vagina or anus.<sup>189</sup> It has been suggested that acts of gross indecency should also be included.<sup>190</sup>

### **Which relationships should be included within an incest offence?**

The present range of relationships contained within the offence seems arbitrary. If it is thought that eugenics should constitute the basis of the offence, then there is a case for including uncles, aunts, nieces and nephews. If, on the other hand, the principal ground for the offence is not considered to be eugenics then the offence could be reconfigured to include certain other relationships.

#### **Siblings**

The CLRC proposed that the offence of incest should no longer apply where sexual intercourse takes place between siblings who have attained the age of 21 years.<sup>191</sup> This proposal has been strongly criticised and a substantial majority of those who commented on the proposal to the CLRC were opposed to any such change.<sup>192</sup> It would mean that in cases of sexual intercourse between siblings of 21 there would be no offence unless rape could be established. It has been pointed out in the literature that sexual relationships between siblings is frequently coercive<sup>193</sup> but such coercion that is used would by no means necessarily come within the limited scope of rape or the section 2 offence. Coercion does not simply cease at 21. The CLRC's proposals were seemingly made in ignorance of modern research into sexual abuse.

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<sup>186</sup> See National Children's Home, *The Report of the Committee of Enquiry into Children and Young People who Sexually Abuse Other Children* (1992).

<sup>187</sup> CLRC Report, *op.cit.* para. 8.44; Scottish Law Commission, *The Law of Incest in Scotland*. Report No.69, Cmnd. 8422 (1981).

<sup>188</sup> See eg D.E.H. Russell, *Sexual Exploitation* (1984),p.189.

<sup>189</sup> Crimes Act 1958, s.2A(2)

<sup>190</sup> See Temkin, "Do We Need A Crime of Incest" *loc.cit.* p.201.

<sup>191</sup> CLRC Report, *op.cit.* para. 8.44.

<sup>192</sup> CLRC Report, *op.cit.* para. 8.20.

<sup>193</sup> See Temkin, "Do We Need a Crime of Incest" *loc.cit.* at footnote 59.

### Uncles and nieces

Uncles and nieces are not permitted to marry and in Scotland, unlike England, the crime of incest covers intercourse between them. The CLRC was not disposed to recommend such an extension in the law. This approach has been queried mainly on two grounds.<sup>194</sup> First, studies indicate that abusive relationships between uncles and nieces are not uncommon.<sup>195</sup> Secondly, eugenically speaking, it makes no sense to exclude uncles and nieces and to include half brothers, half sisters, grandparents and grandchildren since all have on average one quarter of their genes in common. Genetic risks increase substantially if genes in common exceed one in eight.

### Aunts and nephews

Such relationships are included within the offence of incest in Scotland. The CLRC concluded that the case for including such relationships within the offence was not made out.<sup>196</sup> Certainly this concurs with the research literature which reveals hardly any such cases.

### Adoptive parents

The CLRC and the Scottish Law Commission both proposed that these relationships be included within the offence.<sup>197</sup> This has been the position in New South Wales since 1965.<sup>198</sup> Where there is no blood tie children may be at greater risk of abuse than where there is. There is a prohibition against marriage with an adopted child.

### Adoptive siblings

Adoptive siblings may marry. The Scottish Law Commission regarded this as an insuperable barrier to including such relationships within an incest offence.<sup>199</sup> But the Government's proposed abuse of trust provision, which criminalises sexual activity between persons in authority even though such persons are capable of marriage, suggests that this is not necessarily a definitive argument. It would be possible to include such relationships where the parties are under 18. Given the protection afforded to natural born siblings it might be thought to be undesirable that adoptive siblings are not covered by the law at all even where they are living under the same roof.

### Male victims

In Victoria, homosexual as well as heterosexual acts are now included within the ambit of incest.<sup>200</sup> If the offence is not to be based on eugenic grounds alone, its limitation to acts against females could be considered to involve a failure to provide equal protection for the private and family life of males and therefore open to challenge under Article 14 of the ECHR.

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<sup>194</sup> *Ibid* p.202-203.

<sup>195</sup> See eg, Diana Russell, *op.cit.* p.186; D. J. West, *Sexual Victimization* (1985), pp.29, 33, 39, 42, 48, 49.

<sup>196</sup> CLRC Report *op.cit.* para. 8.24.

<sup>197</sup> CLRC Report *op.cit.* para. 4.17; Scottish Law Commission, *op.cit.* para. 4.17.

<sup>198</sup> Adoption of Children Act 1965, s.35 (1).

<sup>199</sup> *Op.cit.* para. 4.16.

<sup>200</sup> Crimes Act 1958, s.2A (2).



## Step-parents

Research studies indicate that the perpetrators of sexual abuse are not infrequently stepparents.<sup>201</sup> The CLRC proposed that it should be a separate offence for a stepparent to have sexual intercourse with a stepchild under 21.<sup>202</sup> Under the present law of Scotland such relationships are covered by incest without an age ceiling. Whether or not English law should subsume such relationships within the offence of incest or create a new offence depends very much upon whether it is thought that the rationale of the crime of incest should be a eugenic one. Stepchildren in common with natural children also need protection from acts apart from sexual intercourse.

## Female Liability for Incest

At present it is an offence for a woman of the age of 16 or over to permit a man whom she knows to be her grandfather, father, brother or son to have sexual intercourse with her by consent. This will ensure that in many cases the victims of sexual abuse can be prosecuted themselves. Although this seldom happens- only one woman was prosecuted in 1997<sup>203</sup> – some victims of incest will be deterred from reporting lest they themselves are branded as criminals. It is possible that this provision could be challenged under Article 8 of the ECHR on the ground that it denies victims the right to respect for their private and family life. It has been argued that this provision should be abolished in all cases save those involving siblings.<sup>204</sup> The CLRC proposed that women should be exempt from liability for incest until they are 21 but that the present law should prevail where sisters are concerned.<sup>205</sup>

## Liability of son for incest with his mother

The CLRC has recommended that sons should be exempt from liability for incest until they reach 21.<sup>206</sup> This would place sons on an equal footing with daughters under the CLRC proposals. However the literature suggests that such cases are very rare and that when they occur they not infrequently involve coercion by the son of his mother.<sup>207</sup> It is not clear that this proposal is justified.

The issues for the review are therefore:

Should the crime of incest be confined to acts of sexual intercourse?

To which relationships should it apply?

In what circumstances, if any, should women be liable for incest?

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<sup>201</sup> See eg Russell *op.cit.* p.172 and H. Maisch, *Incest* (1973) p.97.

<sup>202</sup> CLRC Report, *op.cit.* para. 8.31.

<sup>203</sup> Criminal Statistics Supplementary Tables 1997, *op.cit.* Table S1.1 (A).

<sup>204</sup> Temkin, "Do We Need a Crime of Incest" *loc.cit.* pp.205-6.

<sup>205</sup> CLRC Report, para. 8.37.

<sup>206</sup> CLRC Report, para. 8.36.

<sup>207</sup> See discussion by Temkin, *loc.cit.* pp.206-7.

## 4. SEXUAL INTERCOURSE WITH YOUNG GIRLS

Sections 5 and 6 of the Sexual Offences Act 1956 make it an offence to have sexual intercourse with girls under 13 and under 16 irrespective of consent. In practice both offences may be used in rape cases to save the girl from the ordeal of cross-examination on the consent issue.<sup>208</sup>

### Recorded Offences, Prosecutions and Convictions

There has been a steep decline in the number of offences recorded under s.5. In 1987 there were 312 recorded cases but the figure fell to 148 in 1997.<sup>209</sup> In 1987 there were 155 prosecutions<sup>210</sup>, 50% of the number of recorded offences but by 1997, the figure for prosecutions had dropped to 40,<sup>211</sup> 27% of the number of recorded offences in that year. Similarly the number of convictions for this offence fell from 102 in 1987<sup>212</sup> to 44 in 1997.<sup>213</sup>

A similar dramatic fall has occurred in the number of offences recorded by the police under s.6. In 1987 there were 2,699 such offences recorded. This figure has dropped steadily over the decade and fell to 1,112 in 1997.<sup>214</sup> The number of prosecutions for the offence has similarly dropped over the decade. In 1987, there were 360, 13% of the number of recorded offences<sup>215</sup> as against 153 in 1997, 14% of recorded offences in that year.<sup>216</sup> There has been a drop in convictions from 346 in 1987<sup>217</sup> to 199 in 1997.<sup>218</sup>

Since it is inconceivable that the figures of recorded offences mirror any actual decline in the number of offences committed, these figures are hard to understand. They could suggest a growing disinclination to report such offences or perhaps a disinclination on the part of the police to record them. It is also possible that they are being recorded as other offences such as rape. The sharp decrease in the prosecution rate under s.5 requires further investigation.

### Penalties

The maximum penalty is life imprisonment under section 5 and two years under section 6. The discrepancy between the penalty under section 6 and that for indecent assault of a girl of the same age has already been noted. Some cases brought under ss.5 and 6 will involve coercion, fraud and serious abuse of trust. Indeed, where it is considered that genuinely consensual activity was involved between young people of more or less the same age prosecution is most unlikely to occur. The maximum penalty under section 6 would appear, therefore, to be far too low.

<sup>208</sup> Where rape is charged, an alternative verdict of USI is not permitted: *R v Hodgson* (1973) 57 Cr.App.R.502. Prosecutors are often reluctant to charge both offences for tactical reasons. It is noteworthy that there is research evidence from abroad to suggest that first sex is often forced sex: see Report by the Social Exclusion Unit, *Teenage Pregnancy Cm 43342* (1999) para.6.11.

<sup>209</sup> Criminal Statistics 1997, *op.cit.* Table 2.16.

<sup>210</sup> Criminal Statistics Supplementary Tables 1987 Vol.1 Table S1.1 (A).

<sup>211</sup> Criminal Statistics Supplementary Tables 1997, *op.cit.* Table S1.1 (A).

<sup>212</sup> Criminal Statistics Supplementary Tables 1987 Vol. 1 Table S1.1 (A) and Vol.2 Table S2.1 (A).

<sup>213</sup> Criminal Statistics Supplementary Tables 1997 Annex A, p.4.

<sup>214</sup> Criminal Statistics 1997, *op.cit.* Table 2.15.

<sup>215</sup> Criminal Statistics Supplementary Tables 1987 Table S1.1 (A).

<sup>216</sup> Criminal Statistics Supplementary Tables 1997 *op.cit.* Table S1.1 (A).

<sup>217</sup> Criminal Statistics Supplementary Tables 1987 Vol.1 Table S1.1 (A) and Vol. 2 Table S2.1 (A).

<sup>218</sup> Criminal Statistics Supplementary Tables 1997 Annex A p.4.



## Sentencing

In 1997 only 27 men were sentenced to imprisonment for USI with a girl under 13, 61% of those convicted.<sup>219</sup> Ten of these received sentences of over three and up to four years, 12 received less than this and five received more. The heaviest sentence, which was passed on one man only, was of over seven and under ten years duration. The average sentence length was 43 months.<sup>220</sup>

In the case of USI with a girl under 16, 72 men were sentenced to imprisonment at the Crown Court in 1997. Of these only five received a sentence of between 18 months and two years. The rest received sentences less than this. The average sentence length was 12 months.<sup>221</sup> A further six were sentenced at the Magistrates Court to an average sentence of three and a half months.<sup>222</sup> Therefore only 39% of those convicted received sentences of immediate imprisonment for this offence.

## Defences

There is no defence to the section 5 offence but under section 6, the so-called young man's defence applies. Under s.6 (3) a man under 24 who believed on reasonable grounds that the girl was over 16 has a defence provided that he has not been charged with a similar offence before. A man who has gone through a ceremony of marriage with a girl under 16 and who believes on reasonable grounds that she is his wife also has a defence.

Strongly influenced by subjectivist orthodoxy, which seeks to impose a mens rea requirement irrespective of context or social outcome, the CLRC recommended that the Morgan principle should be made to apply to both offences. It proposed that where D believed that the girl was 16 or over, he should not be liable either for the s.5 or the s.6 offence irrespective of whether his belief was reasonable or not. Moreover, it proposed that when arguing this defence, the burden on the defence should be evidential only.<sup>223</sup> This proposal was opposed by women's groups and, if implemented, would undoubtedly have driven a coach and horses through both provisions. Defendants, as a matter of course, would have pleaded the age defence. An assertion of mistaken belief as to age would be hard to gainsay, substantially harder than a mistake as to consent where surrounding circumstances may indicate that no such belief was held. This would have ensured that few prosecutions were brought and that even fewer resulted in convictions. The Law Commission's misgivings about Morgan and the Government's rejection of such a defence in its proposed abuse of trust provision would seem to undermine this suggestion.<sup>224</sup>

The question remains whether a defence should be introduced to the section 5 offence and whether the present defences under section 6 should remain or be modified. It might be thought that s. 2 of the Sexual Offences (Amendment) Bill 1998, which provides a defence to a charge of abuse of a position of trust, could provide a model for such a defence. It states:

"It shall be a defence for A to prove that, at the time of the intercourse or activity, he did not know and could not reasonably have been expected to know, that B was under 18".

<sup>219</sup> Criminal Statistics Supplementary Tables 1997, Annex A, p.4.

<sup>220</sup> *Ibid* Table S2.4 p.53.

<sup>221</sup> *Ibid*

<sup>222</sup> *Ibid*, Table S1.3 p.69.

<sup>223</sup> CLRC Report, *op.cit.* para. 5.26.

<sup>224</sup> But see the judgement of Brooke L. J. in *B v DPP* [1998] 4 All ER265 in which he expresses support for the CLRC's proposals.

It remains to be seen how the phrase “could not reasonably have been expected to know” will be interpreted and whether it might be construed to carry with it the implication that A should have made some enquiry as to this matter. However, given the context in which the defence arises, it is clear that it is unlikely to afford a substantial loophole through which abusers may slip. This is because, if A is in a position of trust in relation to B, A can be expected to know B’s age. It would be remarkable if a foster-parent or teacher or carer did not know or could not reasonably have been expected to know the age of a person in his trust. However, were such a defence to be imported into section 5, the result is likely to be very different. Where no position of trust is involved, it will not be hard for D to argue that he could not reasonably have been expected to know that the girl was under 13. The defence would ensure that children of this age were routinely cross-examined about what clothes and make-up they were wearing at the time of the encounter with D. This is likely to lead to the conclusion that there may have been reasonable grounds for D’s belief. Thus the introduction of such a defence would mean that girls under 13 were less well protected than those in the 16-18 age bracket covered by the abuse of trust provision.

The virtue of the present law is that it helps to ensure that men think twice about sexual intercourse with girls who are no more than children and may encourage them to make enquiries about age. A change in the law would shift this balance. The introduction of a defence under s.5 could serve only to diminish still further the current conviction rate. Strict liability as to age does at least ensure that the rare cases which are prosecuted result in convictions so that children are protected. The same considerations would apply to the introduction of such a defence to s.6.

A major study conducted by the Cambridge Institute of Criminology in the 1950s suggested that the young man’s defence was responsible for the low prosecution rate under section 6.<sup>225</sup> Similarly, The Social Exclusion Unit’s recent Report on Teenage Pregnancy notes that this defence makes it more difficult to show a realistic prospect of conviction when the man is under 24 which may influence the CPS when deciding whether to prosecute.<sup>226</sup> It may be that consideration should be given to narrowing this defence so that it applies only to young men under the age of 18 or to abolishing it altogether. Strict liability is not outlawed by the ECHR<sup>227</sup> and the need to protect victims and the vulnerable from exploitation has become an increasing concern in the jurisprudence of the ECHR.<sup>228</sup>

The issues for the review are therefore:

- 1. Should there be any alteration of the penalty under s.6?**
- 2. Should new defences be introduced under s. 5 and 6? Should the young man’s defence be abolished or modified?**

<sup>225</sup> *Sexual Offences – A Report of the Cambridge Department of Criminal Science* (1957) p.48.

<sup>226</sup> *Op.cit.* para. 6.15.

<sup>227</sup> *Salabiaku v France* (1988) 13 E.H.R.R. 379.

<sup>228</sup> See discussion of Article 8 in C. Ovey, “The European Convention on Human Rights and the Criminal Lawyer: An Introduction” [1998] *Crim LR* 4 at pp.6-7.



## 5. BURGLARY AND RAPE

Under s.9 (1) (a) of the Theft Act 1968 a person who enters a building as a trespasser with intent to rape commits the offence of burglary. The offence would cover a man who knows that a particular person is in the building and intends to have sexual intercourse with him or her without consent or where he intends to have sexual intercourse with that person and could not care less whether he or she is consenting or not. It would also cover the situation where a man enters a building as a trespasser intending to have intercourse with or without consent if he finds someone in the building.<sup>229</sup> In neither case would it be necessary to prove that rape actually took place or was attempted. An intention formed once entry into the building has been completed would seem to be outwith the scope of the offence.

This offence is a very useful complement to the existing range of sexual offences. It ensures, *inter alia*, that a man who breaks into a woman's house intending to rape her can be held liable for a serious offence even though he has not yet embarked upon the rape when he is discovered or apprehended.

There has been a marked increase in the number of prosecutions for this offence over the past decade. In 1987 proceedings were brought against 155 defendants as against 723 in 1992. This figure dropped to 613 in 1997. The conviction rate has not kept pace, however, with this rise. There were 109 convictions for the offence in 1987 and 133 in 1997.<sup>230</sup> Thus the number of convictions has remained almost the same. It is not at all clear how this is to be explained. Further investigation into this matter would be helpful. In 1992 and 1997, 174 and 176 persons respectively were cautioned for the offence.<sup>231</sup> It is not clear what circumstances would justify a caution for an offence of this gravity.

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<sup>229</sup> See Smith, *op.cit* para.11-30.

<sup>230</sup> Figures provided by Home Office Research and Statistics Directorate.

<sup>231</sup> Figures provided by Home Office Research and Statistics Directorate.

## 6. INDECENT EXPOSURE

### Existing Law

Indecent exposure is an offence at common law but its elements have not been defined in the case law with much precision.<sup>232</sup> The *actus reus* essentially involves the commission of an act in public by a male or a female which is capable of being viewed by more than one person and outrages public decency. It is not clear that any mental element is required although the accidental commission of such an act would presumably not suffice. Smith and Hogan have argued that, at the very least, D should have intended or been reckless as to whether the exposure would be seen by two or more persons who do not consent to see it.<sup>233</sup> There is, however, no authority for this proposition.

In practice, the common law offence is probably hardly used. Instead, prosecutions are brought under s. 4 of the Vagrancy Act 1824 or under s.28 of the Town Police Clauses Act 1847. S.4 provides that “every person wilfully, openly, lewdly and obscenely exposing his person with intent to insult any female...shall be deemed a rogue and vagabond.” The offence requires the exposure of the penis by a male with the specific intention of insulting a female. There is no requirement that the exposure take place in public. The maximum penalty is three months’ imprisonment on summary conviction and one year’s imprisonment on a second conviction upon committal to the Crown Court for sentencing. S.28 of the Town Police Clauses Act 1847 provides that “every person who in any street, to the annoyance of the residents or passengers...wilfully and indecently exposes his person is guilty of an offence punishable summarily.” There is no requirement of a specific intent to insult. There are also local acts and bye-laws which contain offences of indecent exposure for which the penalty is a small fine.

An indecent exposure may amount to an indecent assault, with a maximum penalty of ten years’ imprisonment, where V is placed in fear that D is going to do something to her of an indecent nature. Where the offence takes the form of masturbation in the presence of a child, this could amount to an offence under the Indecency with Children Act 1960 which carries a maximum penalty of two years’ imprisonment.

### Statistical Background

Home Office statistics do not reveal the number of offences of indecent exposure recorded annually.<sup>234</sup> In McNeil’s study,<sup>235</sup> which involved interviews with 100 women who had experienced indecent exposure, few had reported the matter to the police. It seems likely that this offence, in common with other sexual offences, is considerably under-reported. The number of persons proceeded against for indecent exposure is declining sharply. Whereas 1307 men were proceeded against under the Vagrancy Act in 1987, this number had fallen to 747 in 1997.

Similarly proceedings brought under the Town Police Clauses Act declined from 1046 in 1987 to 568 in 1997.<sup>236</sup> Thus the number of prosecutions has almost halved under both acts. The reason for this is not known. But the downward trend in prosecutions had commenced well before

<sup>232</sup> See Smith and Hogan, *Criminal Law* (1999) pp.477-479.

<sup>233</sup> *Ibid.* p.478.

<sup>234</sup> It is intended that such information will be made available in the published statistics in the future.

<sup>235</sup> S. McNeil, “Flashing: Its Effect on Women” in Hanmer and Maynard, *Women, Violence and Social Control* (1987) pp.93-109.

<sup>236</sup> Statistics provided by Home Office Research and Statistics Directorate.



the last decade. In the early 1970s, the annual number of prosecutions was over 3000.<sup>237</sup> Bluglass suggested that this decline in the prosecution rate was indicative of a greater tolerance on the part of the public towards such behaviour<sup>238</sup> but there is no evidence to support this view. The number of convictions under both acts has declined correspondingly, with 1030 convictions under the Vagrancy Act in 1987 as against 529 in 1997 and 933 convictions under the Town Police Clauses Act in 1987 as against 469 in 1997.<sup>239</sup>

### Offending Behaviour

Indecent exposure involves different types of behaviour. Rooth<sup>240</sup> divided exposers into two main categories. Category 1 exposers were inhibited men of good character, tormented by an irresistible impulse, who exposed a flaccid penis and felt humiliated by their behaviour. Category 2 exposers were less inhibited men who, in a state of excitement, exposed an erect penis, frequently masturbating and sometimes shouting or uttering obscenities. Later researchers found this typology useful. In his study of 100 men who had been referred to the Midland Centre for Forensic Psychiatry out-patient clinic having been charged with indecent exposure, Bluglass found that 44 fell into Category 1 and 56 into Category 2.<sup>241</sup> But he also found that the exposers could be divided into three further distinct categories. Some men only exposed to children (28 in the sample), some only to adolescent girls (25 in the sample) and some only to women (33 in the sample). Only four men in the sample exposed to mixed ages and in ten cases the age of the victim was unknown.<sup>242</sup> Thus, in the vast majority of cases, exposure was targeted rather than random. 20% of men in the sample had previous convictions for indecent exposure and 5% had convictions for other sexual offences.<sup>243</sup> Men who exposed to children included the older men in the sample. They were often retired, single or widowers. They were the more intelligent group and when accepted for treatment, attended regularly. By contrast, men who exposed to adolescents were younger, (60% in their twenties) and most were more aggressive exposers in Rooth's Category 2. They had a worse record of previous convictions than those in the other two groups. A majority of those in the sample who were married fell into this group. Those assigned for treatment were co-operative. Men who exposed to adult women were young, mainly single men. A substantial proportion failed to co-operate with treatment or discharged themselves against advice.<sup>244</sup>

The Bluglass study was concerned exclusively with offenders. It demonstrates that indecent exposure is by no means simply the province of pitiful, old men as might have been thought. Furthermore, Walker and McCabe's study, which looked at men convicted of indecent exposure against whom a hospital order was made, concluded that "where mental disorder is involved, the notion that exhibitionists never do any harm is a myth."<sup>245</sup> Bluglass, however, somewhat

<sup>237</sup> There were 3,266 prosecutions under s.4 in 1970, 3,272 in 1971 and 3,143 in 1972: Home Office, Working Party on Vagrancy and Street Offences, *Working Paper*, (1974) p.45.

<sup>238</sup> R. Bluglass, "Indecent Exposure in the West Midlands" in D. J. West ed. *Sex Offenders in the Criminal Justice System*, Cropwood Conference Series No.12 (1980) p.171 at p.180.

<sup>239</sup> Figures provided by Home Office Research and Statistics Directorate.

<sup>240</sup> F .G. Rooth, "Indecent Exposure and Exhibitionism" (1971) 5 *British Journal of Hospital Medicine* 521-533.

<sup>241</sup> Bluglass *op.cit.*, p.174.

<sup>242</sup> *Ibid.* at p.176

<sup>243</sup> *Ibid.* at p.175.

<sup>244</sup> *Ibid.* at pp.176-7.

<sup>245</sup> Walker and McCabe, *Crime and Insanity in England* Vol.2. (1973) p.132.

unaccountably, concluded that “indecent exposure is an offence that is more of a nuisance than a menace as far as the general public is concerned”.<sup>246</sup> This pays no regard to the possible reactions of victims. Indeed, it might have been thought that victims, who were at the receiving end of the aggressive Category 2 exposure described by Rooth and committed by the majority of offenders in the Bluglass sample, would not have regarded the matter as simply a nuisance. McNeil’s study of victims of indecent exposure tends to support this view. She found that fear, shock and disgust were the most common reactions and that the fear concerned was the fear of death.<sup>247</sup>

### Reform Proposals

The law of indecent exposure is clearly out of date. It is unsatisfactory that the same conduct is dealt with by a number of separate statutory provisions as well as by the common law. The law should recognise that what is involved here is inappropriate and frequently aggressive and intimidating sexual behaviour rather than simply a public nuisance.

Proposals to change the law were made by a Home Office Working Party in 1974.<sup>248</sup> It proposed that a new offence be created which would punish exposure of the male genital organs where D either knew or ought to have known that this exposure was likely to be seen by persons to whom it was likely to cause offence.<sup>249</sup> It was not prepared to commit itself to a particular verbal formula which is not surprising since drafting such a provision will pose difficulties. It is not entirely clear that “offence” is the reaction, which should be singled out in this context. Fear, shock and disgust are equally apposite. But there is much to be said for the Working Party’s view that there should be liability where D ought to have known of the likely impact of his behaviour as well as where he was so aware. There has, however, been predictable criticism of this aspect of the recommendation.<sup>250</sup> But Leigh’s counter-proposal, that the essence of the offence should “consist in an intent or willingness to frighten, alarm or disgust a person accosted or... persons of whose actual or likely presence in the vicinity D is aware”,<sup>251</sup> would ensure a substantial decriminalisation of behaviour covered by existing law. Exposers may not *consciously* have such intentions. Rooth’s Category 1 offenders seem not to desire to frighten, alarm or disgust.<sup>252</sup> It might also be hard to prove, as would now be necessary after the decision in *Woollin*<sup>253</sup>, that the irresistible impulse which apparently overcame them, allowed them to foresee at the time that such a result was virtually certain to occur. Given the possible impact of their behaviour on victims, however, it would be unthinkable for such men to be brought outwith the law.

The Law Commission also recommended the creation of a new, minor offence which would penalise sexual intercourse or other overt sexual behaviour taking place in such circumstances that the participants knew or ought to have known that it was likely to be seen by other persons

<sup>246</sup> Bluglass *op.cit.* p.180.

<sup>247</sup> McNeill, *op.cit.* p.102.

<sup>248</sup> Home Office, Working Party on Vagrancy and Street Offences, Working Paper (1974).

<sup>249</sup> *Ibid.* para. 161.

<sup>250</sup> See L. H. Leigh, “Indecency and Obscenity-Indecent Exposure” [1975] Crim. L.R. 413 at 414.

<sup>251</sup> *Ibid.*

<sup>252</sup> See above under the heading “Offending Behaviour”.

<sup>253</sup> [1998] 4 All ER 103.



to whom the behaviour was likely to cause offence.<sup>254</sup> It is clear that this offence would be broad enough to cover acts of indecent exposure and was intended to complement the offence proposed by the Home Office Working Party. The recommended maximum penalty was a fine of £100. The Law Commission considered that the common law offence of indecent exposure could safely be abolished if this proposal together with the Home Office proposal were implemented.<sup>255</sup> Again the question arises whether “likely to cause offence” is the most appropriate phrase. Is it apt, for example, to describe the reaction of a child victim to indecent exposure?

In Ireland there are also several offences dealing with indecent exposure.<sup>256</sup> The Irish Law Reform Commission has proposed that these should be replaced by a single offence of intentionally committing an indecent act in public or in such circumstances that the act is seen by another person who does not consent to seeing it and D either knows the other does not consent or is reckless as to whether he or she does or does not consent.<sup>257</sup> This proposal has considerable disadvantages. It would bring consent issues into this area of law so that lack of consent of the victim would need to be established as it is for rape and indecent assault. It would also require the same *mens rea* as for these offences. This formula would carry with it many of the attendant difficulties which now surround the prosecution of rape and indecent assault and would ensure that far fewer men who commit acts of indecent exposure were prosecuted and convicted.

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<sup>254</sup> Law Commission, Working Paper No. 57 *Conspiracies relating to Morals and Decency* (1974), para. 82.

<sup>255</sup> *Ibid.* para.83

<sup>256</sup> See T. O'Malley, *Sexual Offences: Law, Policy and Punishment* (1996) pp.166-170.

<sup>257</sup> Irish Law Reform Commission, *Vagrancy and Related Offences* (1985) para. 8.11.

## 7. RESTRUCTURING SEXUAL OFFENCES: GRADATION

In many jurisdictions in the common law world an important aspect of sexual offences law reform has been a restructuring of sexual offences to move away from the old categories of indecent assault and rape into newly devised categories. Many jurisdictions have favoured gradation, which is the creation of an integrated ladder of offences and a graduated penalty scheme.

### Forms of gradation

Gradation has taken different forms in different jurisdictions. For example, in New South Wales, the Crimes (Sexual Assault) Amendment Act 1981 abolished the crimes of rape and attempted rape and created a new structure containing four graded offences of sexual assault incorporating indecent assaults and buggery as well. Category 1 carried a maximum penalty of 20 years, Category 2, 12 years, Category 3, seven years and Category 4, four years. In 1989 the law was changed to reduce the categories to three.<sup>258</sup> In Canada, the offences of rape, attempted rape, sexual intercourse with the feeble-minded and indecent assault on a male and a female were abolished and replaced by a new three rung ladder of sexual assault offences. This closely resembles the ladder of assault offences but has considerably higher maximum penalties. Thus, to mirror the offences of assault (five years), assault with a weapon (ten years) and aggravated assault (14 years), the offences of sexual assault (ten years), sexual assault with a weapon (14 years) and aggravated sexual assault (life) were introduced. In Michigan, a far more complex and ambitious gradation scheme was introduced which established four new offences *viz.* criminal sexual conduct in the first, second, third and fourth degree to encompass former offences of rape, indecent assault, incest, sexual intercourse with under age girls, sodomy and gross indecency. Penalties range from life for the first-degree offence to two years for the fourth degree offence.<sup>259</sup>

### Purpose

Restructuring and gradation have been introduced for a variety of reasons, some pragmatic and some ideological. One purpose was to improve prosecution and conviction rates:

“By re-classifying the conduct involved in such a way as to distinguish the grave from the less grave, it was hoped to discourage unwarranted pleas of not guilty and to overcome both the reluctance of prosecutors to bring charges and of courts to convict”.<sup>260</sup>

By setting penalties for each offence on the ladder at what was considered to be an appropriate level, it was intended that plea-bargaining would not result in defendants bargaining their way into sentences which were far lighter than they deserved. Judges would also be given far more guidance in sentencing than under existing laws which were regarded as affording far too much discretion in sentencing to the judiciary. It was also believed that gradation would encourage more women to report to the police since it involved lower maximum penalties for some types of rape. It was felt that high penalties dissuaded some women who were reluctant to see a man imprisoned for life.<sup>261</sup>

<sup>258</sup> Crimes (Amendment) Act 1989 No. 198.

<sup>259</sup> See 259 J. Temkin, *Rape and the Legal Process* (1987) pp.95-109 and Appendix.

<sup>260</sup> *Ibid* p.96.

<sup>261</sup> Warren Young, *Rape Study* (1983) Department of Justice and Institute of Criminology, Wellington, New Zealand, p.108.



In moving from one offence of rape with a heavy penalty, (often life imprisonment or even capital punishment in some American states) to several offences with a range of penalties, legislatures were espousing the view that not all rapes are of uniform seriousness and that they need to be separated out in terms of their gravity. This was seen as a modern and enlightened approach. Thus a contrast was drawn between the new graded law and the old law which was thought to be “moralistic and absolute {since it} recognised only one gradation of rape.”<sup>262</sup> As Loh explained:

“A woman was either defiled or not; chastity violations did not come in degrees. Harsh penalty was prescribed for despoiling a chaste woman because rape diminished her marketability and undermined marriage and the family”.<sup>263</sup>

By contrast a gradation of offences could distinguish between the many different sorts of rape:

“Rape can range from a non-consensual act accompanied by violence and physical injury to the victim, pack rape, rape of a tiny child right through to ‘date rape ‘or so-called petty rape”.<sup>264</sup>

In Canada ideological reasons were very much to the fore. The view advanced by feminist writers that rape was more a crime of violence than one of sex was pursued with particular fervour. The new classification of offences was designed to shift “attention away from rape as a sexual offence and towards the right of every person to be free from physical assault”.<sup>265</sup> Thus offences were graded in terms of the degree of violence involved and the presence or absence of penetration became irrelevant. Similarly, in New South Wales where rape was abolished and a new gradation scheme introduced, this step was explained on the basis that “the structure of the rape offence unduly emphasised the sexual component as distinct from the violence component.” The aim was to “place primary emphasis upon the violence factor in sexual assault rather than upon the element of sexual contact”.<sup>266</sup> The Michigan gradation scheme, on the other hand, does distinguish between penetration and other forms of sexual assault.

A further attraction of gradation is that it arranges sexual offences thematically and offers a coherent, organised framework which appears to fit within a modern code of criminal law rather better than old-style sexual offences which are, by contrast, somewhat random and disparate in nature.

### Conceptual objections

Certain criticisms may be voiced against gradation schemes. Most focus on violence. But if rape is indeed about violence and not about sex then it is not clear why it should be distinguished from other offences of violence and why it should not be subsumed within the law relating to offences against the person. The Canadian law in particular appears to suffer from an inherent contradiction. It attempts to represent rape and allied offences as crimes of violence and yet imposes penalties that far exceed those for violent crimes.

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<sup>262</sup> Wallace D. Loh, “What has Reform of Rape Legislation Wrought?” (1981) 37 *Journal of Social Issues* 28 at p.32.

<sup>263</sup> *Ibid.*

<sup>264</sup> Helen Coonan, “Rape Law Reform-Proposals for Reforming the Substantive Law” in J. Scutt ed. *Rape Law Reform (1980)* Australian Institute of Criminology, p.40.

<sup>265</sup> Canadian Law Reform Commission, Working Paper No.22, *Sexual Offences (1978)*, p.21.

<sup>266</sup> G. D. Woods, *Sexual Assault Law Reforms in New South Wales (1981)* Department of the Attorney General and of Justice pp.7,12.

Many feminist commentators<sup>267</sup> now regret the de-sexualisation of rape and have begun to acknowledge that legislation which has sought to achieve this has been an unfortunate mistake.<sup>268</sup> Certainly, to focus on violence is to miss the point that sexual coercion takes many forms only some of which involve any violence at all. Arguably, gradation schemes shift what is a sentencing matter to centre stage. Centre stage should be the sexual violation. The use of violence is a factor to be regarded along with others by the judge when sentencing. If the purpose of the law on sexual offences is the protection of sexual autonomy then the law needs to make that statement clearly. By focussing on the violence of the conduct the law simply reiterates the message which is already conveyed by offences against the person namely that violence is wrong. In saying nothing about the principle of sexual autonomy it denies it. Warren Young points out that judges in New South Wales have been highly critical of the legislation for placing “an unwarranted emphasis on the means used to obtain intercourse while paying too little attention to the act of intercourse itself.”<sup>269</sup> By relegating sexual intercourse without consent to a third category offence the legislation effected in the words of Hunt J. “an unwarranted down-grading of the humiliation and the degrading aspects of sexual assault”<sup>270</sup>. Young’s New Zealand study, which involved interviews with victims, demonstrated that the New South Wales and Canadian models were not in keeping with the way in which most victims described their rape experience. He states:

“Victims who had been beaten felt that the act of sexual intercourse rather than the assault was the primary injury...Any legislation highlighting the violent component of the offence at the expense of the sexual violation involved would therefore seem to be at odds with the perception of many victims”.<sup>271</sup>

Accompanying violence can always be dealt with by charging the defendant additionally with offences of violence. Moreover, as Smart sagely suggests, it was naïve to think that the transposition of rape into a crime of violence would necessarily work as a strategy for facilitating the successful prosecution of rape in the courts. Violence in a sexual context becomes ambiguous and may be presented as pleasurable.<sup>272</sup>

Not all gradation schemes desexualise rape or focus exclusively upon violence. But, if violence is abandoned as an organising theme, it becomes far more difficult to construct a ladder of offences. As the CLRC discovered when it attempted to provide a two-tier system of indecent assaults, it is not at all clear what conduct ought to be consigned to the more or less serious categories. The assumption that was made by legislatures adopting gradation, that rapes differ as to seriousness, begs the question which rapes are more serious than others. Certainly, the view cited above that there is such a thing as “petty rape” and that date rape is somehow less serious than certain other forms of rape would today be regarded by many as totally unacceptable. Legislation passed in Victoria illustrates the difficulty. It creates a four rung ladder of offences. The sexual dimension is retained and offences are distinguished according to the existence of aggravating circumstances. These consist of the use of serious violence, the carrying of an offensive weapon or explosive, the performance of an act which is likely seriously and substantially to degrade or humiliate the

<sup>267</sup> See, for example, Catherine McKinnon, *Feminism Unmodified: Discourses on Life and Law* (1987), p.86.

<sup>268</sup> See V. Bell ‘Beyond the “Thorny Question”: Feminism, Foucault and the De-sexualisation of Rape’ (1991) 19 *International Journal of the Sociology of Law* 83. C. Mackinaw *Towards a Feminist Theory of the State* (1989) chap.9.

<sup>269</sup> Young, *op.cit.* p.109.

<sup>270</sup> R v Smith (1982) unreported, Supreme Court of New South Wales, quoted by Young, *op.cit.* p.109.

<sup>271</sup> Young, *op.cit.* p.109.

<sup>272</sup> Carol Smart, *Feminism and the Power of Law*, (1989) p.46.



victim, where the perpetrator is aided or abetted by another person and where he has a previous conviction for indecent assault or rape.<sup>273</sup> This selection of circumstances is open to objection for its random and arbitrary nature. That rape is in itself degrading and humiliating seems to be denied. The fact that the perpetrator has previous convictions does not relate to the quality of the offence itself although it is clearly relevant to what sentence he should receive. It could equally well be argued that aggravating factors should focus upon the impact that the rape has had upon the victim- whether she has been seriously mentally traumatised, lost her reproductive capacity, become pregnant, or HIV positive. To elevate any circumstances above others will always be a random exercise and will detract fundamentally from the issue of autonomy which should be central.

Thus gradation may satisfy the instinct for neatness but it is not clear that existing gradation schemes which focus on levels of violence can be justified theoretically or ideologically. On the other hand, the more sophisticated Michigan scheme which does not seek to deny the sexual element of sexual abuse and, whilst emphasising violence, does not exclude certain other forms of coercion, is so cumbersome and complex as to be a prosecutor's nightmare. Gradation, if it is to be successful, requires a simple structure of offences. Without a coherent organising theme such simplicity cannot be achieved. Arguably there is no such theme.

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<sup>273</sup> Crimes Act 1958, s.38.